

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





76 1269

B  
PAS

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

CASE NO. 76-1269

UNITED STATES OF AMERICA,

Appellee

vs.

HERBERT SPERLING,

Appellant

Appeal from Order of United States  
District Court for the Southern Dis-  
trict of New York on Reconsideration  
of Sentencing on Count 1 (Conspiracy)



APPELLANT'S APPENDIX

HERBERT SPERLING  
APPELLANT PRO SE  
BOX PMB 78271  
United States Penitentiary  
Atlanta, Georgia 30315

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :  
Appellee :  
VS. :  
HERBERT SPERLING, :  
Appellant :

CASE NO. 76-1269

APPELLANT'S APPENDIX

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UNITED STATES DISTRICT COURT

D. C. Form No. 100 Rev.

JUDGE POLLACK

S. 73 CRIM. 44

TITLE OF CASE

THE UNITED STATES

ATTORNEY

For U. S.: 261-6562

AUSA Lavin

HERBERT SPERLING, et al.

see page two for all defendants

For Defendant:

(11) Daniel Sul  
250 Park A  
New York, N  
tele: 697-1

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.
J.S. 2 mailed	Clerk	4/1/73	Stewart	5
J.S. 3 mailed 5-13-76	Marshal	9/1/73	Stewart	5
Violation	Docket fee	9/1/73	Stewart	5
Title 21:846 conspiracy to violate narcotic laws (ct. 1)		9/1/73	Stewart	5
21:Sec. 848 engage in a continuing crim. enterprise (ct. 2), 812, 841(a)		9/1/73	Stewart	5
(1), 841(b)(1)(A) dist. & poss. with intent to dist. cocaine (cts. 3, 4, 7,		9/1/73	Stewart	5
8, 10, 11, 12) and		9/1/73	Stewart	5
heroin, I (cts. 5, 6, 9) --- TWELVE COUNTS ---		9/1/73	Stewart	5

DATE

PROCEEDINGS

5-11-73 Filed Indictment and ordered sealed for 30 days unless further ordered  
Court. - B/M ordered. ----- Ryan, J.

5-15-73 Indictment unsealed by Judge Pollack in open Court.  
case assigned to Judge Pollack as a related matter (73 CR 330)

continued on page 2

A



all defendants:

4/12/73 1.)	HERBERT SPERLING	cts. 1,2,8,9,10
4/17/73 2.)	BEN MALLAH	1,8,9,10
4/18/73 3.)	NORMAN GOLDSTEIN, a/k/a Sonny Gold	1
4/18/73 4.)	JACK BLESS	1,4,5,6
4/18/73 5.)	EDWARD BLESS	1,6
4/18/73 6.)	VINCENT PACELLI, JR.	1,3,6,7,8,9,10
4/18/73 7.)	NICHOLAS CUCCINELLO, a/k/a "Nicky Red"	1
4/18/73 8.)	ISRAEL TOPPES	1
4/18/73 9.)	PETER SALAMARDI	1
4/18/73 10.)	COURTLAND SAMPLE, a/k/a "Bucky"	1
4/18/73 11.)	JOSEPH CONFORTI	1
4/18/73 12.)	SAM KAPLAN	1
4/18/73 13.)	CECILE SPERLING	1
4/18/73 14.)	JUAN SERRANO, a/k/a John Negron (a/k/a ex 1, 5-7-75)	1,7,10
4/18/73 15.)	FRANK BASSI, JR.	1
4/18/73 16.)	ANTOINETTE BASSI	1
4/18/73 17.)	ALBERT PEREZ, a/k/a Abbe Perez	1,6,12
4/18/73 18.)	FRED BERGER	1
4/18/73 19.)	AL BRACER	1,6
4/18/73 20.)	FRANK SERRANO	1,3
4/18/73 21.)	EDUARDO RAMIREZ	1,6
4/18/73 22.)	LUIS VALENTINE, a/k/a Paron Lombardero	1,11
4/18/73 23.)	OCTAVIO DEL BUSTO (a/k/a ex 11, 5-6-75)	1,11
4/18/73 24.)	HEISON GARCIA	1,11
4/18/73 25.)	JOHAN WEYL	1
4/18/73 26.)	SALVATORE RUGGIERO	1
4/18/73 27.)	JACK SPADA	1
4/18/73 28.)	JOHN DOE, a/k/a "Eddie" 5-15-73 true name EDWARD PETER SCHWOORCK	cc

5-15-73 JOHN DOE, a/k/a "Eddie" - true name: EDWARD PETER SCHWOORCK - Deft. (Atty. 7/31) not  
pleads not guilty. Bail fixed in the sum of \$150,000. Trial set for  
June 15, 1973 Pollack

5-17-73 N. GOLDSTEIN (Atty. present) Deft. pleads not guilty. R.O.R. on this indictment  
Pollack, J.

5-17-73 N. CUCCINELLO (Atty. Michael Santangelo present) - Deft. pleads not guilty.  
bail application.  
L. VALENTINE (produced on writ) - Atty. Victor L. Brizel present. Deft. pl  
guilty. Bail fixed at \$75,000. - Writ adjourned to 5-15-73 at 10 A.M.  
O. DEL BUSTO - (produced on writ) - Atty. Allen Stims present. Deft. pleads  
Bail fixed at \$25,000. to cover this indictment. Writ adj. to 5-15-7  
S. RUGGIERO - (Atty. Edwyn Silberling present) - Deft. pleads not guilty. D  
continued on bail of \$35,000. fixed in indictment 73 CR 330 -- Pollack

5-21-73 OCTAVIO DEL BUSTO - Filed affdvt. & notice of motion to sever count 11...To:  
evidence.

5-22-73 O. DEL BUSTO - Filed affdvt. of Allen S. Stims in support of defendants pre-

B

DATE	PROCEEDINGS
1-6-77	Filed w/h/c ad pros. for J. Bless 10-1-75 satisfied. Pollack, J.
1-25-76	Filed true copy of order of U.S.C.A. that the appeal of order denying motion to have the order of nolle pros. amended is dismissed m/n (for deft. Herbert Sperling)
2-2-76	Filed true copy of order of U.S.C.A. that the Opinion filed 10-10-75 of the U.S.C.A. is amended to read as follows: "On Court One, we affirm the convictions of appellants Sperling, Goldstein, Bless, Juan Serrano, Valentine and Schwaraki; we reverse and remand for a new trial the convictions of appellants Lissi, Berger and Frank Serrano; and we reverse the convictions of appellants Del Busto and Garcia, et. al. w/n (See entry of 1-10-76)
10-76	Filed true copy of order of the U.S. ... that the motion of app. 11: ... ... granted on default. Clerk m/n
103-76	Filed letter from deft. ... to Judge Pollack re: reduction of sentence ... and MEMO-ENP. motion for reduction or modification of sentence ... Pollack, J. w/n pro-se
15-76	Filed Govt.'s affidavit re: writ of habeas corpus ad pros. for Herbert Sperling. ret. 4-5-76
16-76	Filed deft. H. Sperling's notice of motion re: reduction of sentence
15-76	Filed letter from Joseph W. Mallins, Esq. atty for deft. H. Sperling re: adjourns hearing on motion for reduction
13-76	Filed Govt. w/h/c/ ad pros. for Herbert Sperling satisfied 4-5-76. Pollack, J.
1-76	Filed Govt.'s affidavit re writ of habeas corpus ad pros. for Herbert Sperling. ret. 6-7-76.
1-75	Filed deft.'s motion (H. Sperling) for reconsideration of sentence on ct. 1.
76	Filed Govt.'s memo of law re: motion of H. Sperling for reduction.
76	Filed Order that the that sentence heretofore imposed on Ct. 1- (as to deft. H. Sperling) is adhered to, viz: 30 yrs. impr. on ct. 1 and fined \$30,000 to be paid, etc. Pollack, J. m/n
1-76	HERBERT SPERLING (Prod. and writ for new sentencing.) Writ satisfied. Defendant. remanded. POLLACK, J.

-cont'd on next page-







UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

HERBERT SPERLING,  
BEN MALLAH,  
NORMAN GOLDSTEIN, a/k/a Sonny Gold,  
JACK BLESS,  
EDWARD BLESS,  
VINCENT PACELLI, JR.,  
NICHOLAS CUCCINELLO, a/k/a "Nicky Red",  
ISMAEL TORRES,  
PETER SALANARDI,  
COURTLAND SAMPLE, a/k/a "Bucky",  
JOSEPH CONFORTI,  
SAM KAPLAN,  
CECILE SPERLING,  
JUAN SERRANO, a/k/a John Negron,  
FRANK BASSI, JR.,  
ANTOINETTE BASSI,  
ALBERT PEREZ, a/k/a Abbe Perez,  
FRED BERGER,  
AL BRACER,  
FRANK SERRANO,  
EDGARDO RAMIREZ,  
LUIS VALENTINE, a/k/a Ramon Lombardero,  
OCTAVIO DEL BUSTO,  
NELSON GARCIA,  
SUSAN WEYL and  
SALVATORE RUGGIERO,  
JACK SPADA,  
JOHN DOE, a/k/a "Eddie",

Defendants.

INDICTMENT

§ 73 Cr. 441

The Grand Jury charges:

From on or about the 1st day of January,  
1971, and continuously thereafter up to and including  
the date of the filing of this indictment, in the  
Southern District of New York, HERBERT SPERLING,  
BEN MALLAH, NORMAN GOLDSTEIN, a/k/a Sonny Gold,  
JACK BLESS, EDWARD BLESS, VINCENT PACELLI, JR.,  
NICHOLAS CUCCINELLO, a/k/a "Nicky Red", ISMAEL  
TORRES, PETER SALANARDI, COURTLAND SAMPLE, a/k/a  
"Bucky", JOSEPH CONFORTI, SAM KAPLAN, CECILE SPERLING,

JUAN SERRANO, a/k/a John Negron, FRANK BASSI, JR., ANTOINETTE BASSI, ALBERT PEREZ, a/k/a Abbe Perez, FRED BERGER, AL BRACKER, FRANK SERRANO, EDUARDO RAMIREZ, LUIS VALENTINE, a/k/a Ramon Lombardero, OCTAVIO DEL BESTO, NELSON GARCIA, SUSAN WEYL, SALVATORE RUGGIERO, JACK SPADA and JOHN DOE, a/k/a "Eddie", the defendants, and Louis Mileto, Carlo Lombardi, Nicholas Lugo, Peter Aponte, Barry Lipsky and Alberto Gonzalez, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each others to violate Sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would sell, barter, exchange and give away narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, not in pursuance of a written order of the person or persons to whom such narcotic drugs were sold, bartered, exchanged and given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, contrary to law, in violation of Sections 4705(a) and 7237(b), Title 26, United States Code.

3. It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and



possess with intent to distribute Schedule I and II narcotic drug control and substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1), and 841(b)(1)(A) of Title 21, United States Code

#### OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. In or about May, 1971, defendant Frank SERRANO transported approximately one-half kilogram of cocaine to the vicinity of 78th Street and Lexington Avenue, New York, New York.
2. In or about August, 1971, defendant JUAN SERRANO, a/k/a John Negron delivered to defendant VINCENT PACELLI, JR. one kilogram of cocaine.
3. In or about July, 1971, defendant EDGARDO RAMIREZ delivered two cans of lactose to 1420 Third Avenue, New York, New York.
4. In or about September, 1971, defendant JACK BLESS exited a building on West 96th Street, New York, New York carrying five kilograms of heroin.
5. On or about October 18, 1971, defendants LUIS VALENTINE, OCTAVIO DEL BUSTO, NELSON GARCIA and co-conspirator Alberto Gonzalez went to the vicinity of the Castillian Room Bar, 303 East 56th Street, New York, New York.
6. In or about November, 1971, defendant HERBERT SPERLING delivered to defendant VINCENT PACELLI, JR. two kilograms of heroin.

appx 7

7. In or about November, 1971, co-conspirator Barry Lipsky delivered to defendant SUSAN WEYL two kilograms of heroin.

8. On or about August 16, 1972, defendant HERBERT SPERLING met with defendant BEN MALLAH in the vicinity of 844 Seventh Avenue, New York, New York.

9. On or about September 20, 1972, defendants HERBERT SPERLING and NORMAN GOLDSTEIN, a/k/a Sonny Gold, met in the vicinity of 644 Seventh Avenue, New York, New York.

(Title 21, United States Code,  
Section 846.)

#### COUNT TWO

The Grand Jury further charges:

From on or about the 1st day of May, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HERBERT SPERLING, the defendant, unlawfully, wilfully, intentionally and knowingly did engage in a continuing criminal enterprise in that he unlawfully, wilfully, intentionally and knowingly did violate Title 21, United States Code, Sections 841(a)(1) and 841(b)(1) (A) as alleged in Counts Eight, Nine and Ten of this indictment which are incorporated by reference herein, which violations were a part of a continuing series of violations of said statutes undertaken by the defendant in concert with at least five other persons with respect to whom the defendant occupied a position of organizer, supervisor and manager and from which continuing series of violations the defendant obtained substantial income and resources.

(Title 21, United States Code, Section 848)

*H. M. S.*



### COUNT THREE

The Grand Jury further charges:

In or about the month of May, 1971, in the Southern District of New York, FRANK SERRANO and VINCENT PAGELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one-half kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

### COUNT FOUR

The Grand Jury further charges:

In or about the month of August, 1971, in the Southern District of New York, JACK BLESS, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately two kilograms of cocaine.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

### COUNT FIVE

The Grand Jury further charges:

In or about the month of September, 1971, in the Southern District of New York, JACK BLESS, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately five kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT SIX

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, JACK BLESS, EDWARD BLESS, VINCENT PACELLI, JR., ALBERT PEREZ, a/k/a ABBE PEREZ, EDGARDO RAMIREZ and AL BRACER, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18 United States Code, Section 2)

COUNT SEVEN

The Grand Jury further charges:

In or about the month of August, 1971, in the Southern District of New York, JUAN SERRANO, a/k/a John Negron and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT EIGHT

The Grand Jury further charges:

In or about the month of July, 1971, in the Southern District of New York, HERBERT SPERLING, BEN MALLAN and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute



and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT NINE

The Grand Jury further charges:

In or about the month of November, 1971, in the Southern District of New York HERBERT SPERLING, BEN MALLAH and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT TEN

The Grand Jury further charges:

In or about the month of December, 1971, in the Southern District of New York, JUAN SERRANO, a/k/a John Negron, VINCENT PACELLI, JR., HERBERT SPERLING and BEN MALLAH, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT ELEVEN

The Grand Jury further charges:

On or about the 18th day of October, 1971, in the Southern District of New York, LOUIS VALENTINE, a/k/a Ramon Lombardero, OCTAVIO del BUSTO and NELSON

GARCIA the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 303.5 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT TWELVE

The Grand Jury further charges:

On or about the 18th day of November, 1971, in the Southern District of New York, ALBERT PEREZ, a/k/a Abbe Perez, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 121.7 grams of cocaine hydrochloride.

(Title 21, United States Code, Section 812, 841(a)(1), 841(b)(1)(A); Title 18, United States Code, Section 2.)

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FORMAN

---

WHITNEY NORTH SEYMOUR, Jr.  
United States Attorney



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-VERSUS-

HERBERT SPERLING, ET AL,

DEFENDANTS

73 CR. 442

NOTICE OF MOTION

*filed 3/26/76*

SIRS:

PLEASE TAKE NOTICE, that upon the annexed Affidavit of Herbert Sperling, defendant herein, the undersigned Herbert Sperling, acting as his own attorney, will move this Honorable Court on May 3, 1976, or at the earliest date and time thereafter convenient to the Court, as follows:

(a) To comply with the mandate of the United States Court of Appeals for the Second Circuit filed in this Court January 30, 1975, pursuant to the opinion of the Court of Appeals dated October 10, 1974 (506 F. 2d 1323, at page 1335, marginal note 14), wherein the Court of Appeals remanded the above-styled case to this Court "for reconsideration of sentencing" on Count One of the indictment (conspiracy count); and

(b) To grant such other and further relief as to the Court may seem just and proper, relative to Count One of the indictment.

Defendant is filing herewith a separate motion with the Court requesting issuance of a writ or order directing the United States Marshal and/or the Warden of the United States Penitentiary in Atlanta to produce defendant Herbert Sperling in Court so that he can act as his own attorney at hearing on reconsideration of sentencing on Count One, and can exercise his right of allocution pursuant to Rule 43, Federal Rules of Criminal Procedure.

Dated: March 18, 1976  
United States Penitentiary  
Atlanta, Georgia 30315

To: United States Attorney  
Southern District of New York  
1 St. Andrews Plaza  
New York, New York

Yours, etc.

*Herbert Sperling*  
HERBERT SPERLING  
Defendant-Movant Pro Se  
Box PM 78271  
Atlanta, Georgia 30315

*open 13*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-VERSUS-

HERBERT SPERLING, ET AL,  
DEFENDANTS

73 CR. 441

AFFIDAVIT

STATE OF GEORGIA )  
COUNTY OF FULTON ) SS.:

filed 3/26/76

HERBERT SPERLING, as defendant in the above-styled case and acting as his own attorney, being duly sworn, deposes and says:

1. I have elected, and do hereby elect, to act as my own attorney in this case, pursuant to my rights under the Sixth Amendment, and I desire to be present in person to represent myself at the hearing to be held on reconsideration of sentencing on Count One of the indictment in the above-styled case. I hereby waive assistance of counsel in this case.

2. On October 10, 1974, the United States Court of Appeals for the Second Circuit remanded the above-styled case to this Court "for reconsideration of sentencing" on Count One of the indictment. United States v. Sperling, et al, 506 F. 2d 1323, at page 1335, marginal note 14. Mandate was filed in this Court January 30, 1975.

3. With respect to co-defendants Del Busto, Serrano and Jack Klass, this Court has already complied with the mandate of the Court of Appeals directing reconsideration of sentencing. As a matter of equal protection and due process of law, coupled with the declared policy of this Court for speedy disposition of criminal cases on remand, this Court should comply with the mandate of the Court of Appeals without further delay.

4. Defendant Sperling presently is confined in the United States Penitentiary in Atlanta, Georgia, pursuant to sentences imposed by this Court in the above-styled case. Defendant requests this Court to issue



a writ or order directing the United States Marshal and/or the Warden of the United States Penitentiary to produce him in this Court at the hearing to be held on reconsideration of sentence on Count One.

5. Defendant, in his capacity as his own attorney, intends to present factual and legal argument in connection with this Court's reconsideration of sentencing on Count One.

6. Defendant also desires to exercise his right of allocution in connection with reconsideration of sentencing, pursuant to Rule 43, Federal Rules of Criminal Procedure.

*Herbert Sperling*  
HERBERT SPERLING, AFFIANT  
Defendant-Movant pro se  
Box FMB 78271  
United States Penitentiary  
Atlanta, Georgia 30315

Sworn to and subscribed before me this 18th day of March, 1976

---

CERTIFICATE OF SERVICE

I certify this 18th day of March, 1976, that I have mailed a copy of the foregoing affidavit, and a copy of the foregoing annexed notice of motion, first class postage prepaid, to counsel for the United States, addressed as follows: United States Attorney, Southern District of New York, 1 St. Andrews Plaza, New York, New York.

*Herbert Sperling*  
HERBERT SPERLING  
Defendant-Movant, pro se

*filed 3/26/76*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-AGAINST-

HERBERT SPERLING, ET AL,

DEFENDANTS

73 CR. 441  
AMENDMENT TO  
NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE, that the notice of motion dated March 1<sup>st</sup>, 1976, wherein the undersigned Herbert Sperling, acting as his own attorney, gave notice that he would move this Honorable Court on May 3, 1976, or at the earliest date and time thereafter convenient to the Court, to comply with the mandate of the United States Court of Appeals for the Second Circuit filed in this Court January 30, 1975, pursuant to the opinion of the Court of Appeals dated October 10, 1974 (506 F. 2d 1323, at page 1335, note 14), is hereby amended, by adding the annexed affidavit of Herbert Sperling, setting forth additional and specific grounds and prayers for relief, and by adding the accompanying "Memorandum of Law in Support of Herbert Sperling's Motion for Reconsideration of Sentencing on Count One (Conspiracy Count)", relative to said additional grounds and prayers for relief. The said affidavit and the said memorandum of law are by reference incorporated herein.

Yours, etc

Dated:

*Herbert Sperling*  
HERBERT SPERLING  
Defendant-Movant pro se  
Box PMB 78271

To: United States Attorney  
Southern District of New York  
1 St. Andrews Plaza  
New York, New York

*filed 5/17/76*



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-AGAINST-

HERBERT SPERLING, ET AL,

DEFENDANTS

73 CR. 441

AFFIDAVIT OF HERBERT SPERLING

IN SUPPORT OF AMENDMENT TO

NOTICE OF MOTION DATED MARCH

18, 1976

STATE OF NEW YORK, SS.:

HERBERT SPERLING, as defendant in the above-styled case, and acting as his own attorney, being duly sworn, deposes and says:

1. By notice of motion dated March 18, 1976 I notified the United States Attorney and this Honorable Court that on May 3, 1976, or at the earliest date and time thereafter convenient to the Court, I would move this Honorable Court to comply with the mandate of the United States Court of Appeals for the Second Circuit, and "To grant such other and further relief as to the Court may seem just and proper, relative to Count One of the indictment (conspiracy count)."

2. The principal ground for relief I intend to urge is as follows: "The Count One conspiracy was a necessarily required element and lesser included offense of the concerted action and series of violations charged in Count Two as elements of a continuing criminal enterprise." Therefore, upon reconsideration of sentencing pursuant to the mandate of the Court of Appeals, this Court should impose no sentence at all on Count One, but should vacate the sentence heretofore imposed, and dismiss Count One, with prejudice.

3. Alternatively, I will urge the following ground for relief: "Count One must be construed as drawn under the general conspiracy statute (18 U.S.C. 371) with five year maximum penalty." Therefore, if the Court denies relief on the ground urged in the foregoing paragraph (2), then, and in that event, the Court should reduce the sentence on Count One to not more than five years imprisonment and a fine of not more than \$10,000.00, pursuant to penalty provision of 18 U.S.C. 371. Unless Count One is construed as drawn under 18 U.S.C. 371, it is incurably duplicitous, and fatally defective, and any sentence imposed on Count One would be totally void.

Page 2 of Affidavit of Herbert Sperling

4. Alternatively, and in event the Court denies relief on the grounds set forth in paragraphs 2 and 3, above, then I will urge the following ground for relief: "If the allegations and proof of the pre-May 1, 1971 conspiracy were effectively withdrawn from the jury, then Count One was impermissibly amended in violation of the Fifth Amendment." Therefore, the sentence on Count One is void, and should be vacated, and Count One should be dismissed with prejudice.

5. Alternatively, and in event all the grounds set forth above are denied, I will urge the following ground for relief: "If Sperling is re-sentenced as a second offender under 21 U.S.C. 846, the maximum legal penalty is two years and a \$10,000 fine." Therefore, upon reconsideration of sentence pursuant to mandate of Court of Appeals, the maximum sentence the Court may impose on Count One is two years imprisonment, and fine of \$10,000.

6. Attached hereto is my "Memorandum of Law in Support of Herbert Sperling's Motion for Reconsideration of Sentencing on Count One (Conspiracy Count)", which is by reference incorporated herein. Said memorandum of law amplifies the grounds above mentioned and cites authority, and is relied on by me for the relief sought. I hereby certify under oath that all the facts stated in said attached memorandum of law are true.

Herbert Sperling  
HERBERT SPERLING, AFFIANT  
Defendant-Movant, Pro Se  
Box PMB 78271

Sworn to and subscribed before me this \_\_\_\_\_ day of \_\_\_\_\_, 1976

Authorized by the Act of July 7, 1955  
to Administer Oaths (18 U.S.C. 4004).

CERTIFICATE OF SERVICE

I certify this \_\_\_\_\_ day of \_\_\_\_\_, 1976, that I have mailed a copy of the foregoing affidavit, and amendment to notice of motion, and a copy of the annexed memorandum of law, to counsel for the Government, first class postage prepaid, addressed as follows: United States Attorney, 1 St. Andrews Place, New York, N.Y. 10007.

Herbert Sperling  
HERBERT SPERLING  
AFFIANT-DEFENDANT-MOVANT, PRO SE



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

**-VERSUS-**

HERBERT SPERLING, ET AL,  
DEFENDANTS

73 CR. 441

On Remand from the United States Court  
of Appeals for the Second Circuit  
Mandate Filed January 30, 1975  
506 F. 2d 1323

MEMORANDUM OF LAW IN SUPPORT OF HERBERT SPERLING'S  
MOTION FOR RECONSIDERATION OF SENTENCING  
ON COUNT ONE (CONSPIRACY COUNT)

HERBERT SPERLING  
DEFENDANT-MOVANT PRO SE  
BOX PMB 78271

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STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both. . . . June 25, 1948, c. 645, 62Stat. 701.

21 U.S.C. 812. Schedules of controlled substances -- Establishment

(This statute lists heroin as a Schedule I controlled substance, and cocaine as a Schedule II controlled substance).

Effective May 1, 1971

21 U.S.C. 841(a)(1). Prohibited acts A -- Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Effective May 1, 1971

21 U.S.C. 841(b)(1)(A). Penalties

(This statute provides penalties for distributing or possessing with intent to distribute heroin and cocaine. For a first offender, penalty is up to 15 years imprisonment and \$25,000.00 fine. For a second offender, penalty is doubled.)

Effective May 1, 1971

21 U.S.C. 844. Penalty for simple possession; . . .

(This statute provides penalties for simple possession of controlled substances, including heroin and cocaine. For a first offender, penalty is up to one year and \$5,000 fine. For a second offender, penalty is doubled).

Effective May 1, 1971



21 U.S.C. 846. Attempt and conspiracy.

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Effective May 1, 1971

21 U.S.C. 848. Continuing criminal enterprise -- Penalties; forfeitures.

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than \$100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than \$200,000, and to the forfeiture prescribed in paragraph (2). . .

Continuing criminal enterprise defined.

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) (This subparagraph provides that a person convicted of engaging in a continuing criminal enterprise shall not be eligible for a suspended sentence, probation, or parole).

Effective May 1, 1971

2

26 U.S.C. 4705(a). Order forms. Repealed May 1, 1971

(a) General Requirement. -- It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 7237. Violation of laws relating to narcotic drugs and to marihuana Repealed May 1, 1971

(b) Sale or other transfer without written order. -- Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than \$20,000. . .

Amendment V, United States Constitution. (Indictment, Double Jeopardy, Due Process)

No person shall be held to answer for . . . infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy . . . nor be deprived of life, liberty, or property, without due process of law.



1 /

SUPERSEDING INDICTMENT NO. 73 CR. 441, AS AMENDED

RETURNED MAY 11, 1973 (IRRELEVANT PARTS OMITTED)

The Grand Jury Charges:

Count One

From on or about the 1st day of <sup>May</sup> ~~January~~, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HERBERT SPERLING, BEN MALLAH, NORMAN GOLDSTEIN, a/k/a/ Sonny Gold, JACK BLESS, EDWARD BLESS, VINCENT PACELLI, JR., NICHOLAS CUCCINELLO, a/k/a "Nicky Red", ISMAEL TORRES, PETER SALANARDI, COURTLAND SAMPLE, a/k/a "Bucky", JOSEPH CONFORTI, SAM KAPLAN, CECILE SPERLING, JUAN SERRANO, a/k/a John Negron, FRANK BASSI, JR., ANTOINETTE BASSI, ALBERT PEREZ, a/k/a Abbe Perez, FRED BERGER, AL BRACER, FRANK SERRANO, EDGARDO RAMIREZ, LUIS VALENTINE, a/k/a Ramon Lombardero, OCTAVIO DEL BUSTO, NELSON GARCIA, SUSAN VEYL, SALVATORE RUOGIERO, JACK SPADA and JOHN DOE, a/k/a "Eddie", the defendants, and Louis Mileto, Carlo Lombardi, Nicholas Lugo, Peter Aponte, Barry Lipsky and Alberto Gonzalez, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

~~2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would sell, barter, exchange and give away narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, not in pursuance of a written order of the person or persons to whom such narcotic drugs were sold, bartered, exchanged and given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, contrary to law, in violation of Sections 4705(a) and 7237(b), Title 26, United States Code.~~

1 / The Court amended Count One before submitting it to the jury, by changing beginning date of conspiracy from January 1, 1971, to May 1, 1971, and by deleting all of paragraph 2, relating to violations of "old" laws which were repealed May 1, 1971. Changes and deletions are indicated by red print and red line. (R. 4123, 4238-4239).

(Count One, Continued)

3. It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

(Nine overt acts omitted)

(Title 21, United States Code, Section 846).

Count Two

The Grand Jury further charges:

From on or about the 1st day of May, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HERBERT SPERLING, the defendant, unlawfully, wilfully, intentionally and knowingly did engage in a continuing criminal enterprise in that he unlawfully, wilfully, intentionally and knowingly did violate Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A) as alleged in Counts Eight, Nine and Ten of this indictment which are incorporated by reference herein, which violations were a part of a continuing series of violations of said statutes undertaken by the defendant in concert with at least five other persons with respect to whom the defendant occupied a position of organizer, supervisor and manager and from which continuing series of violations the defendant obtained substantial income and resources. (Title 21, United States Code, Section 848).

.....

(Counts Three, Four, Five, Six, and Seven charge co-conspirators Frank Serrano, Vincent Pacelli, Jr., Jack Bless, Edward Bless, Albert Perez, a/k/a Abbe Perez, Edgardo Ramirez, Al Bracer, and Juan Serrano, a/k/a John Negron, with substantive violations of Title 21 United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) ).

.....



Count Eight

The Grand Jury further charges:

In or about the month of July, 1971, in the Southern District of New York, HERBERT SPERLING, BEN MALLAH and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine. (Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

Count Nine

The Grand Jury further charges:

In or about the month of November, 1971, in the Southern District of New York HERBERT SPERLING, BEN MALLAH and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin. (Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

Count Ten

The Grand Jury further charges:

In or about the month of December, 1971, in the Southern District of New York, JUAN SERRANO, a/k/a John Negron, VINCENT PACELLI, JR., HERBERT SPERLING and BEN MALLAH, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine. (Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

.....

(Counts Eleven and Twelve charge co-conspirators Luis Valentine, a/k/a Ramon Lombardero, Octavio del Busto and Nelson Garcia with substantive violations of Title 21 United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); and Title 18, United States Code, Section 2, in Count Eleven; in Count Twelve, co-conspirator Albert Perez, a/k/a Abbe Perez, is charged with substantive violation of said statutes.)

### QUESTIONS PRESENTED

1.

Whether the conspiracy charged in Count One was a necessarily required element, and a lesser included offense, of the concerted action charged in Count Two, and/or of the series of violations charged in Count Two as part of a continuing criminal enterprise.

2.

If answer to foregoing question is negative, whether Count One must be construed as being drawn and submitted to jury under the general conspiracy statute, 18 U.S.C. 371, with maximum penalty of five years and \$10,000 fine.

3.

Whether the allegations and proof of pre-May 1, 1971 part of the Count One conspiracy were effectively withdrawn from the jury's consideration; and if so, whether this constituted an impermissible amendment of Count One in violation of the Fifth Amendment.

4.

Whether the jury, under the Court's charge, could have convicted Sperling of conspiring to violate 21 U.S.C. 844, which prohibits the simple possession of cocaine, with maximum penalty of two years imprisonment and \$10,000 fine for a second offender; and if so, whether Sperling's sentence under Count One, for conspiracy, should be limited to maximum penalty provided by 21 U.S.C. 844.



#### STATEMENT OF THE CASE

On May 11, 1973, superseding indictment No. 441 was filed. As to defendant-movant Herbert Sperling, hereinafter called Sperling, Count One charged conspiracy; Count Two charged engaging in a continuing criminal enterprise; Counts Eight, Nine and Ten charged substantive violations of the narcotics laws (distributing and possessing with intent to distribute cocaine, heroin, and cocaine, respectively). Counts Three, Four, Five, Six, Seven, Eleven and Twelve charged substantive violations by other co-conspirators of the narcotics laws.

Sperling was convicted on Counts One, Two, Eight, Nine and Ten, and was sentenced as a second offender as follows: On Counts One, Eight, Nine and Ten, 30 years and \$50,000 fine on each count. On Count Two, life without parole and \$100,000 fine. All sentences to run concurrently.

Count One charged that Sperling conspired with numerous other persons, both indicted and unindicted, to violate narcotics laws, from January 1, 1971 to May 11, 1973; that part of the conspiracy was in violation of 26 U.S.C. 4705(a) and 7237(b), both of which statutes were repealed May 1, 1971; and that a further part of the conspiracy was in violation of Sections 812, 841(a)(1), and 841(b)(1)(A), of Title 21, which statutes became effective May 1, 1971. Evidence was elicited to the jury in proof of both the pre- and post May 1, 1971 parts of the conspiracy;<sup>2/</sup> however after the evidence was in and final arguments were made to the jury, the Government "conceded" that there was no proof of the pre-May 1, 1971 part of the conspiracy (R. 4099), the Court so charged the jury (R. 4123), and Count One was physically amended in accordance with the "concession", as shown ante, page 4 (R. 4238-4239). Thus the time span of Count One, as amended, was May 1, 1971 to May 11, 1973. Sperling's co-conspirators named in Count One included, inter alia, Peter Salanordi, Carlo Lombardi, Norman Goldstein, Joseph Conforti, Cecile Sperling, Jack Spada, Edward Peter Schworak, and Louis Mileto.<sup>3/</sup>

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<sup>2/</sup> Evidence elicited in the jury's presence proving the pre-May 1, 1971 part of the conspiracy is summarized post, pages 31-35.

<sup>3/</sup> Edward Peter Schworak was listed in Count One as "John Doe, a/k/a Eddie".



Count Two charged Sperling with engaging in a continuing criminal enterprise in violation of 21 U.S.C. 848. The time span of Count Two was identical with the time span of Count One, as amended, to-wit, May 1, 1971 to May 11, 1973. Count Two charged, inter alia, that during this period of time Sperling was guilty of "a continuing series of violations" of 21 U.S.C. 841(a)(1) and 841(b)(1)(A), which are the same statutes named in Count One, violation of which statutes was the sole object of the conspiracy charged in Count One. Count Two further charged that the series of violations mentioned therein were undertaken by Sperling "in concert with at least five other persons." A bill of particulars, filed July 10, 1973, amplifying Count Two, listed eight persons with whom Sperling conspired and acted in concert, to-wit, Peter Salanordi, Carlo Lombardi, Norman Goldstein, Joseph Conforti, Cecile Sperling, Jack Spada, Edward Peter Schworak, and Louis Mileto -- all of whom were named as co-conspirators in Count One, as aforesaid.

On May 25, 1973, Sperling's attorney filed a pre-trial motion to dismiss Count One of the indictment on the ground that "a group conspiracy as charged in Count One is a logical and necessary prerequisite to commission of the substantive offense charged in Count Two." On May 30, 1973, the Court denied the motion, stating that "The conspiratorial concert of action and the substantive offense are not coterminous." Later, near the end of the trial, the Court amended Count One, as aforesaid, making it coterminous with Count Two, but did not reconsider its order of May 25, 1973, which was based primarily on the ground that Counts One and Two were not coterminous.

The Court in submitting Count One to the jury did not mention either of the special narcotics conspiracy statutes cited in the indictment, old 26 U.S.C. 7237(b) and new 21 U.S.C. 846, but charged that 18 U.S.C. 371, the general conspiracy statute, was applicable (R. 4120-4121). However the Court thereafter imposed sentence under the harsher provisions of the new narcotics conspiracy statute, 21 U.S.C. 846, disregarding the fact that Count One had been submitted to the jury as a Section 371 conspiracy. The sentence imposed on Count One (30 years and \$50,000 fine) was the maximum allowable under 21 U.S.C. 846. The maximum allowable under 18 U.S.C. 371 would have been five years and a \$10,000 fine.

is not significant in view of the Court's charge on Count One, to affect

On direct appeal the Court of Appeals reversed Sperling's convictions on substantive counts Eight, Nine and Ten; affirmed the conviction and sentence on Count Two; and affirmed the conviction on Count One, but remanded Count One for "reconsideration of sentencing on the conspiracy count." The reason stated by the Court of Appeals for this remand was "the same reason as we remand the cases of Del Busto and Garcia for reconsideration of sentencing" (506 F. 2d at page 1335, note 14), whose conspiracy convictions had been reversed and substantive convictions affirmed, but the latter counts had been remanded for reconsideration of sentencing because the erroneous convictions on the former "might have affected the sentence" on the latter (506 F. 2d at page 1343).<sup>h/</sup>

A nolle prosequi was entered by this Court on May 16, 1975 as to Counts Eight, Nine and Ten. In May 1975 this Court reconsidered the sentences of Del Busto and Serrano in compliance with the mandate of the Court of Appeals, and reconsidered the sentence of Jack Bless in August 1975. The mandate with respect to Sperling has not yet been complied with, and the case is now before the Court for "reconsideration of sentencing" on Count One, pursuant to the order and decision of the Court of Appeals dated October 10, 1974, mandate filed in this Court January 30, 1975.

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<sup>h/</sup> United States of America v. Herbert Sperling, et al, 2nd Cir. 1974, 506 F. 2d 1323, cert. den. sub. nom. Sperling v. United States, U.S. \_\_\_\_\_, 43 L.Ed. 2d 439, March 3, 1975.

An order of this Court in this case is reported 362 F. Supp. 909.

The opinion of the Court of Appeals is dated October 10, 1974. The mandate was filed in this Court January 30, 1975.



### SUMMARY OF ARGUMENT

#### 1.

The judgment and sentence on Count One should be vacated, and that Count dismissed with prejudice, because the conspiracy charged therein was a necessarily required element of the concerted action charged in Count Two. The Count One conspiracy was also a lesser included offense, or one of the violations, of the series of violations charged in Count Two as part of the continuing criminal enterprise. Sperling was sentenced on Count Two to life imprisonment and fined \$100,000. The additional punishment imposed on Count One (30 years imprisonment and \$50,000 fine) constitutes double punishment, and double jeopardy, in violation of the Fifth Amendment.

#### 2.

Alternatively, Count One should be construed as drawn and prosecuted under the general conspiracy statute, 18 U.S.C. 371, which carries a maximum penalty of five years imprisonment and \$10,000 fine. Reason: Although Count One purports to be drawn under the narcotics conspiracy statutes, old 26 U.S.C. 7237(b) and new 21 U.S.C. 846, which provide harsher penalties than 18 U.S.C. 371, the trial judge in charging the jury correctly defined the conspiracy in terms of 18 U.S.C. 371, and cited that statute to the jury, as the one alleged to have been violated (R. 4121). The trial judge's reason for this was deliberate, informed, and not inadvertent, as Count One otherwise would have been incurably duplicitous and incurably defective as charging two conspiracies in a single count; viz., one under the "old" narcotics conspiracy statute which was repealed May 1, 1971, and another under the "new" narcotics conspiracy which became effective May 1, 1971. The conspiracy charged in Count One, the evidence presented to the jury in support thereof, covered a time that encompassed both "old" and "new" law violations. The old narcotics conspiracy statute, 26 U.S.C. 7237(b), and the new narcotics conspiracy 21 U.S.C. 846, have different objects and different penalties, and thus in charging the jury, sentencing, and double jeopardy, resulted only by construing the conspiracy as drawn under 18 U.S.C. 371, which was viable during the entire time span of Count One. Only

it possible to interpret Count One as charging a single conspiracy, under a single conspiracy statute. The duplicity in Count One could not be cured merely by withdrawing the "old" law part of the conspiracy from the jury's consideration, as this constituted an impermissible amendment of the indictment in violation of the Fifth Amendment, especially since proof of the old law conspiracy was actually presented to the jury (as will be shown hereinafter) and was not stricken from the record.

3.

Alternatively, if Sperling is resentenced on Count One under penalty provisions of the new narcotics conspiracy statute, 21 U.S.C. 846, the maximum legal penalty is two years imprisonment and a \$10,000 fine, as the jury could have found, under the evidence and the Court's charge, that Sperling conspired only to commit the offense of simple possession of cocaine, in violation of 21 U.S.C. 844, which carries a maximum penalty (for the substantive offense) of two years imprisonment and a \$10,000 fine for a second offender. The penalty for a Section 846 conspiracy to commit a violation of a Section 844 offense is limited to the maximum penalty provided for the substantive offense. The Court in charging the jury failed to limit the objects of the Count One conspiracy to the substantive offense of distributing or possessing with intent to distribute cocaine or heroin, and the Court commented on Sperling's simple possession of a small amount of cocaine (wrapped in a one dollar bill at time of his arrest) in such a manner as to permit his conviction for conspiracy based on simple possession alone.



ARGUMENT

POINT 1

THE COUNT ONE CONSPIRACY WAS A NECESSARILY REQUIRED ELEMENT AND LESSER INCLUDED OFFENSE OF THE CONCERTED ACTION AND SERIES OF VIOLATIONS CHARGED IN COUNT TWO AS ELEMENTS OF A CONTINUING CRIMINAL ENTERPRISE

Statutes

Count Two is drawn under 21 U.S.C. 848, which defines the offense of engaging in a continuing criminal enterprise, and provides a penalty up to life imprisonment without parole for a first offender, plus a fine of \$100,000. One element of a Section 848 offense is that the defendant shall commit a "series" of violations of the narcotics laws. Another element is that he shall undertake to commit such series of violations "in concert" with five or more other persons. Section 848 provides, in pertinent part:

"A person is engaged in a continuing criminal enterprise if . . . he violates any provision of this subchapter . . . the punishment for which is a felony, and . . . such violation is part of a continuing series of violations of this subchapter . . . which are undertaken by such person in concert with five or more other persons with whom such person occupies a position of organizer, a supervisory position, or any other position of management . . ."

Count One as amended purports to be drawn under 21 U.S.C. 846, which defines a narcotics conspiracy and provides punishment as follows:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment for the offense, the commission of which was the object of the conspiracy."

There are two reasons why a completed Section 848 offense necessarily includes a Section 846 conspiracy.

First, one element of a Section 848 offense is that the defendant shall violate narcotics laws "in concert with five or more other persons." It is impossible to act in concert with others without first reaching an agreement to do so. Such agreement is the essence of a conspiracy. Such conspiracy is the sine qua non of acting in concert. This conclusion is fortified by the legislative history of Section 848, which shows that Congress equated acting "in concert" with "conspiring", as alternative ways of expressing the same idea. For instance, the Report of the Senate Judiciary Committee which accompanied the original Senate legislation through that Chamber defined a Section 848 offense, in part, as requiring a finding that the defendant "acted in concert with or conspired with at least five or more other persons. . . ."

Second, Section 848 has other elements within its dragnet language that include "any" violation of "any" provision of the subchapter in which Section 846 appears. Section 846 appears in the same subchapter of the Controlled Substances Act of 1970. One element of a completed Section 848 offense is that the defendant "violates any provision of this subchapter . . . the punishment for which is a felony." Another element is that such violation "is part of a continuing series of violations of this subchapter." Either of these elements could include a Section 846 conspiracy, and in fact did so in the instant case, as the indictment and the evidence show.<sup>4A/</sup> The above-quoted language from Section 848 is open-ended and all-inclusive, encompassing any and all felony violations of "any provision of this subchapter." Section 848 is an octopus with a separate tentacle for each felony violation defined in "this subchapter." Its elements embrace and include every possible felony violation of Chapter 13, subchapters I and II, Controlled Substances Act of 1970, including, inter alia, "any" felony conspiracy defined by Section 846.

Congress did not intend, and the double jeopardy provision of the Fifth Amendment does not permit, a Section 846 offense to be pyramided with a Section 848 offense for punishment purposes. Neither should separate convictions for violations of these two statutes during the same time period be sustained.

<sup>4A/</sup> In defining the elements of the Sec. 848 offense charged in Count Two, the Court charged: "Second, that the offenses charged in Counts 8, 9 and 10 of this indictment are part of a continuing series of violations of the defendant Herbert Sperling of the Federal narcotics laws as contained in the Drug Abuse Prevention and Control Act of 1970." (R. 4139). From this, the jury could infer that the violation of 21 U.S.C. 846 (conspiracy charged in Count One) was "part of a continuing series of violations" required as an element for conviction on Count Two.



### Indictment

Proceeding now from consideration of the statutes involved to the particularities of how they were applied in the instant case, the merging of Count One into Count Two comes into sharper focus.

#### Identical Time Spans.

The time span of the Count One conspiracy is identical to the time span of the Count Two continuing criminal enterprise. Count One as originally drawn covered the period January 1, 1971 to May 11, 1973 (date indictment was returned). However the Court in charging the jury narrowed the Count One time span to conform to the precise and identical period covered by Count Two; to wit, May 1, 1971 to May 11, 1973 (R. 4123).<sup>5/</sup> This was done on the basis of the Government's so-called "concession, that no pre-May 1, 1971 proof of conspiracy was in evidence (R. 4099). The Court also physically amended the indictment so as to make the time spans of Count One and Count Two identical, as shown ante, pages 4-5.

#### Same Conspirators.

Count Two, as supplemented by bill of particulars filed July 10, 1973, names nine persons who allegedly acted in concert to commit multiple violations of the narcotics laws. These nine persons were: Herbert Sperling, Peter Salanordi, Carlo Lombardi, Norman Goldstein, Joseph Conforti, Cecile Sperling, Jack Spada, Edward Peter Schworak,<sup>6/</sup> and Louis Mileto. These same nine persons are included in the conspirators named in Count One. The Court in charging the jury freely intermingled most of these names as persons who "conspired" in Count One and who acted "in concert" in Count Two (R. 4151, 4153).

#### Same Objects.

The object of the Count One conspiracy as to Herbert Sperling (as narrowed by the Court as aforesaid to exclude "old" law violations, R. 4123) was that Herbert Sperling and at least one other person would violate "Sections 812, 841(a)(1) and 841(b)(1)(A)." One of the objects or elements of the Count

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<sup>5/</sup> The Court mistakenly told the jury that the indictment was filed April 13, 1973. Actually, it was filed May 11, 1973. It was a superseding indictment. (R. 4123).

<sup>6/</sup> Edward Peter Schworak was originally listed as "John Doe, a/k/a/ 'Eddie'" in the caption of the indictment and in the body of Count One. The Government on May 15, 1973, furnished his true name and wrote it on the caption of the indictment. His true name was listed in the bill of particulars filed July 10, 1973.

Two enterprise was that Herbert Sperling and at least five others would act, in concert to violate the identical statutes, "Sections 841(a)(1) and 841(b)(1)(A)." 7/

The Court's Charge

Count One:

Everything the Court charged respecting Herbert Sperling's involvement in Count One was also charged, or could properly have been charged, respecting his involvement in Count Two. While everything the Court said about "larger" Count Two was not necessarily applicable to "smaller" Count One, the converse was not true, as to Sperling. There was no "Sperling" element in Count One that was not included in Count Two. This is evident from the entire charge, and particularly from the following excerpts that are illustrative of the Charge on Count One:

"The part of this (narcotics) Act which is applicable to the charges here is called the Controlled Substances Act which became effective May 1, 1971. . . It is sufficient if you remember the conduct which the Act forbids." (R. 4122).

"What is a conspiracy? It is simply a combination or agreement of two or more persons, or concerted action by two or more persons, to accomplish a criminal or unlawful purpose. There have to be at least two people involved. You can't conspire with your self. It is, in essence, a partnership in crime." (R. 4124).

". . . Conspiracy is generally a matter of inference to be drawn from the conduct of the persons charged. Actions may speak louder than words, and a defendant's participation in a conspiracy may be inferred from such facts and circumstances." (R. 4125).

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7/ Section 812 is mentioned in Count One but not in Count Two. This is of no significance, as Section 812 is merely a listing of controlled substances, which is unnecessary and superfluous as the reference to Sections 841(a)(1) and 841(b)(1)(A) by inference includes the citing of Section 812. The citation of Section 812 in Count One was non-essential surplusage.



"To determine whether a conspiracy existed, you piece together the independent evidence relating to each alleged conspirator and determine, looking at the whole picture, whether such acts, conduct and statements of at least two . . ." (R. 4125-4126.)

"If, for example, there was a concerted action among several persons, with each of them doing something related to the acts of the others. . . Such intention may be inferred from the activities of the co-conspirators . . ." (R. 4126).

"The scope of each defendant's agreement must be determined individually. . ." (R. 4129).

"Each is entitled to individual consideration . . . including any evidence of his or her . . . status as partner, manager or supervisor. . ." (R. 4132).

"The fact that the parties are not always identical does not mean that there are separate conspiracies." (Emphasis added). (R. 4133-4134).

The following salient points emerge from the above charge on Count One:

- (1) Conspiracy is the equivalent of concerted action. (2) A conspirator may be either a partner, manager or supervisor in relation to his co-conspirators.
- (3) It is immaterial that the parties are not always identical.

Count Two:

The charge on Count One smoothly telescoped into the Charge on Count Two, as to Herbert Sperling. The Court charged:

"I will now turn to the substantive counts in the indictment and I will refer first to Count Two. The Controlled Substances Act of May 1, 1971, also makes it unlawful for one to engage in a continuing criminal enterprise or in a series of violations of the Controlled Substances Act in concert with five or more other persons with respect to whom one occupies a supervisory or managerial position. . . Count Two is asserted against only the defendant Herbert Sperling. Before you can

find the defendant Herbert Sperling guilty of the crime charged in the 2nd count of the indictment you must be convinced beyond a reasonable doubt . . . that the defendant Herbert Sperling committed . . . a continuing series of violations . . . of the Federal narcotics laws as contained in the Drug Abuse Prevention and Control Act of 1970 . . . in concert with five or more other persons . . . " (R. 4139-4140).

" . . . in simple terms, as I am sure you understand, the prosecution contends from the evidence that they have shown a continuing series of transactions to possess narcotics with intent to distribute and actual distribution of the same through at least five or more persons by Herbert Sperling. " (R. 4140).

The Court's Marshalling of the Evidence Cemented the Merger  
of Counts One and Two as to Herbert Sperling

The Court summed up its charge and marshalled the evidence on Counts One and Two as to Herbert Sperling as follows:

"I will now deal with the evidence produced by the government which it contends points to the guilt of each defendant, first in summary form by counts, and then by defendants, one by one." (R. 4150).

"First in summary. The government contends (as to Count One) that the evidence shows a single conspiracy among all the defendants to purchase, to process and resell narcotic drugs which was in existence within the period May 1, 1971 to mid-April, <sup>8/</sup> 1973 . . . The government contends that Sperling commanded the services of

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8/ As stated in footnote 5, ante, the Court no doubt intended to say "mid-May", as that was when the superseding indictment was returned by the grand jury.



Norman Goldstein, Edward Schworak, Louis Mileto, Cecile Sperling, Jack Spada and Joseph Conforti." (R. 4141).

(The Court is speaking here of Count One).

"Now as to Count Two, which is against Herbert Sperling as the defendant charged. . . The government contends that Sperling occupied a position of organizer, supervisor and manager with respect to six persons in connection with his narcotics business, Edward Schworak, Jack Spada, Norman Goldstein, also known as Sonny Gold, Joseph Conforti, Louis Mileto and Cecile Sperling. The government contends that Schworak, Spada, Goldstein, Conforti, and Mileto stored heroin or mix and at Sperling's direction would dilute narcotics and deliver them." (R. 4153).

Thus the Court told the jury that, as to Count One, Sperling "commanded the services" of six particular persons, and that, as to Count Two, he "occupied a position of organizer, supervisor and manager" of the same six persons. This effectively cemented the merger of Counts One and Two, as to Sperling.

#### The Law

Both the sentence and the conviction on Count One must be vacated, and Count One must be dismissed with prejudice. Where a defendant's conduct violates two separate statutes, it is improper to convict and sentence under both statutes where one offense is, in effect, a lesser included offense of the other, and/or a necessarily included element, and a required element.

The rule that conviction for any offense which includes all the elements of some other offense bars prosecution for the latter is a corollary to the traditional double jeopardy doctrine that two offenses are the same if the evidence sufficient to convict in one would have been sufficient to convict on the other. The test to be applied to determine whether there are two offenses or only one, is whether each of two separate statutory violations requires proof of an additional fact which the other does not. Blockburger v. United States, 344 U.S. 299, 304 (1953). Thus, for example, under this corollary, a defendant convicted

of felony murder could not be re-prosecuted for commission of the underlying felony, since the evidence necessary to convict for the murder includes proof of each and every element of the predicate felony. See, e.g., Cools v. Hendricks, 350 F. Supp. 1010 (W.D. La. 1972). First recognized in American law in Ex parte Nielsen, 131 U.S. 176 (1889), the rule has been repeatedly invoked in the Second Circuit to void multiple convictions, and hence, double punishment, in circumstances where a defendant is convicted of two separate statutory violations, one of which wholly incorporates all of the elements of the other.

Thus here, the rule stands as a bar to the conviction and sentence of Sperling on the Count One conspiracy, all the elements of which are included in the Count Two concerted action. The Count One conspiracy was also one of the series of violations of the narcotics laws mentioned in Count Two as an element of Count Two.

In Ex parte Nielsen, *supra*, Congress, in an effort to suppress polygamy in what was then the Territory of Utah, passed a series of laws which prohibited cohabitation with more than one woman and punishing certain polygamous relationships as adultery. Nielsen had married and was cohabiting with two women. He was indicted for unlawful cohabitation occurring between October 15, 1885 and May 13, 1888, and adultery occurring on May 14, 1888. He pleaded guilty to cohabitation and after serving his sentence, pleaded not guilty to adultery on the ground that the adultery prosecution was barred by his prior conviction. The District Court disagreed, and following his second conviction Nielsen sought habeas corpus relief. The Supreme Court reversed the conviction and ordered the writ issued. The Court found that each and every element, or "incident", of adultery was included in the crime of unlawful cohabitation. Although the indictments alleged that the adultery did not occur until the day after the unlawful cohabitation was complete, the Court concluded that unlawful cohabitation, by its nature a "continuing" offense, included the adultery. Nielsen's sentence and the punishment he underwent on the first indictment was for that entire continuous crime. The present case parallels Nielsen, as the "continuing" criminal enterprise and concerted action charged in Count Two included all of the elements of the conspiracy charged in Count One. Stated another way, the Count One offense was but an "incident" of the continuing criminal enterprise and series of violations involving concerted action charged in Count Two.



The Nielsen rule has been repeatedly and consistently applied in the Second Circuit to void multiple convictions and sentences where the elements of one offense are wholly absorbed and encompassed within another for which the defendant has been convicted:

Schroeder v. United States, 7 F. 2d 60 (2nd Cir. 1925)  
United States v. Levison, 54 F. 2d 363 (2nd Cir. 1931)  
Schechter v. United States, 7F. 2d 881 (2nd Cir. 1929)  
United States v. Waxler, 79 F. 2d 526 (2nd Cir. 1935)  
United States v. Gruchata, 59 F. 2d 1007 (2d Cir. 1932)  
Rouda v. United States, 10 F. 2d 916 (2nd Cir. 1926).  
United States v. Stewart, 523 F. 2d 1263, 1264 (2nd Cir. 1975)  
Gorman v. United States, 456 F. 2d 1258 (2nd Cir. 1972)  
United States v. Stewart, 513 F. 2d 957 (2nd Cir. 1975)  
United States v. Pravato, 505 F. 2d 703 (2nd Cir. 1974)  
United States v. Rosenthal, 454 F. 2d 1252, 1255-1256 (2 Cir. 1972)  
United States v. Umans, 368 F. 2d 725, 730, (2nd Cir. 1966)  
cert. granted 386 U.S. 940, Dism. as improv. granted 389 US 80  
United States v. Febre, 425 F. 2d 107 (2nd Cir. 1970)  
cert. den. 400 U.S. 849 (1971)

The rule is also uniformly applied in other Circuits:

United States v. Belt, 516 F. 2d 873 (8th Cir. 1975)  
United States v. Howard, 507 F. 2d 559 (8th Cir. 1974)  
United States v. Lewis, 157 U.S. App. D.C. 43, 482 F.2d 632, 647 (1973)  
United States v. Tanner, 471 F. 2d 128 (7th Cir. 1972)  
Davis v. United States, 447 F. 2d 480 (7 Cir. 1971)  
O'Clair v. United States, 470 F. 2d 1199, cert, den. 412 U.S. 921 (1st Cir. 1972)  
Wright v. United States, 519 F. 2d 13 (6th Cir. 1975)  
United States v. Mori, 444 F. 2d 240 (5th Cir. 1971)  
Sullivan v. United States, 485 F. 2d 1352 (5th Cir. 1973)  
United States v. Eatherton, 519 F. 2d 603, 612 (1st Cir. 1975)

### Rule of Lenity

The Supreme Court has held that the rule of lenity applies to situations where neither the wording of an Act nor its legislative history clearly indicates that overlapping sections are intended to be cumulatively punishable or convictable. Construing the Bank Robbery Act, for instance, the Court held that entry with intent to rob may not be punished cumulatively with the consummated robbery. Prince v. United States (1957) 352 U.S. 322. Similarly, feloniously receiving and feloniously taking are viewed as a single offense. Heflin v. United States (1959) 358 U.S. 415, 419-420. A comparable holding is found in Milanovich v. United States (1961) 365 U.S. 561. The statutes involved in the instant case, being in the same Act and subchapter, are analogous to the Bank Robbery Act. Just as one must enter a bank in order to rob it, so must one agree and conspire with others in order to act with them "in concert."

The Government may attempt to go outside the Controlled Substances Act of 1970 for an indication that Congress previously intended a rule of harshness, rather than lenity, to apply to former separately enacted narcotics laws. Such intention may well be found, or presumed, in former narcotics statutes that "seemed" to overlap. The leading case on the rule of harshness for narcotics offenders under former laws (now repealed) is Gore v. United States (1958) 357 U.S. 386, where the Supreme Court held that on the basis of one sale of narcotics it was permissible to convict the defendant of (1) the sale of drugs not "in pursuance of a written order"; (2) the sale of drugs "not in the original stamped package"; and (3) the sale of drugs with knowledge that they had been unlawfully imported. Gore is easily distinguished from the instant case. In Gore, Justice Frankfurter pointed out that "The three penal laws for which petitioner was convicted have different origins both in time and design . . . three different enactments, each relating to a separate way of closing in on illicit distribution of narcotics, passed at three different periods . . ." Each of the three statutes in Gore required a distinct element not present in the other two. By contrast, Section 848 and Section 846 in the instant case were included in a single enactment, in the same subchapter, and there is no element in a Section 846 conspiracy that is not included in the larger Section 848 "series" of offenses which require concerted action. None of the three Gore statutes provided the ultimately severe penalty of life without parole as does Section 848; indeed, all of the relatively mild penalties of the Gore statutes, added together,



are far less severe than the Section 848 penalty of life without parole.

It is conceded that Congress has been, and still is, harsh on narcotics offenders; however Congressional harshness is built into the four corners of Section 848, hence need not be presumed as between overlapping sections of the same subchapter. All felony violations of the subchapter in which Section 848 appears are swallowed up in its "continuing" criminal enterprise involving concerted action. Congress was aware of this, and made the punishment fit the crime. Is not life without parole sufficient? Need a dead horse be kicked to death?

The Government's egregious lust for cumulative punishment, over and above life without parole, is reminiscent of the year 1305, when Edward I sat upon the throne of England. The notorious traitors William Wallace and David of Wales were punished. Wallace was "drawn for treason, hanged for robbery and homicide, disembowelled for sacrilege, beheaded as an outlaw, and quartered for divers depredations." David of Wales enjoyed a similar fate. (2 Pollock and Maitland, History of English Law 501, 2d ed. 1905). The punitive overkill in the instant case is cast in the anachronistic mold of the 14th Century.

#### Wharton's Rule and Ianelli v. United States

This case does not turn on Wharton's Rule and does not present the issue raised in Ianelli v. United States (1975) 43 L.Ed. 2d 616, as to whether convictions may be sustained both for a substantive offense involving five or more persons (18 U.S.C. 1955 in Ianelli) and a conspiracy to commit that offense (18 U.S.C. 371 in Ianelli). In the instant case, the object of the 21 U.S.C. 846 conspiracy was not to commit the 21 U.S.C. 848 offense charged in Count Two, but rather to violate 21 U.S.C. 841(a)(1) and 841(b)(1)(A). The Section 848 substantive offense charged in Count Two projected its own built-in conspiracy (concerted action) to violate those same statutes, to-wit, 21 U.S.C. 841(a)(1) and 841(b)(1)(A). Thus Section 846 and 848 have the same objects, rather than the violation of the latter being the object of the former. The only difference between the Count One Section 846 conspiracy and the Count Two Section 848 concerted action was that in the latter, Sperling acted in a managerial capacity and had at least five co-conspirators. This distinction

is not significant in view of the Court's charge on Count One, to effect that a conspirator may be either a "partner, manager or supervisor" in relation to his co-conspirators (R. 4132), that the scope of each defendant's agreement must be determined individually (R. 4129), and it is immaterial that the parties are not always identical (R. 4133-4134). 8A/

The Count Two requirement that Sperling act as manager over at least five others merely added two elements to the Count One conspiracy. In a word, the Count Two concerted action had all the elements of the Count One conspiracy, "plus".

The instant case is further distinguished from Ianelli by reason of the vastly different statutes involved in the two cases, and the interrelationship of those statutes, respectively. As previously stated, one element of a Section 848 offense is the violation of "any provision of this subchapter" and another element is that such violation is "part of a continuing series of violations of this subchapter or subchapter II of this chapter." Thus a Section 848 offense necessarily includes any Section 846 conspiracy, in the same time period, as such conspiracy is a felony violation of "a provision of this subchapter" in which Section 848 appears. There are no comparable catchall provisions or elements in the Ianelli 18 U.S.C. 1955 substantive statute. There is no comparable interrelationship between the Ianelli substantive statute and the Ianelli conspiracy statute, as they are not in the same enactment in the same subchapter, and have no built-in mutuality comparable to the statutes in the instant case.

21 U.S.C. 848, unlike 18 U.S.C. 1955, is one of those rare statutes which includes among its elements the violation of still other statutes.

#### Double Jeopardy

Even assuming arguendo that Congress intended to allow multiple punishment for a Section 846 conspiracy and a Section 848 continuing criminal enterprise in the same time period, the double jeopardy provision of the Fifth Amendment would prevent it, under the facts of the instant case, considering the merger of offenses shown by the indictment, the evidence, and the Court's charge to the jury.

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8A/ The fact that more conspirators were named in Count One than in Count Two is irrelevant, as Sperling's unlawful agreement was single, and the same, regardless of the coming and going of other conspirators. During a pre-trial hearing the Court indicated that the adding of two conspirators to Count One would not affect Sperling individually, one way or the other (R. 17). The Court's charge to the jury showed that the Government relied on the same six co-conspirators in Counts One and Two to convict Sperling of conspiracy and concerted action. (R. 4141, 4153).



### The Remedy

The conviction as well as the sentence on Count One must be vacated, and Count One must be dismissed with prejudice.

In United States v. Rosenthal, supra, 454 F. 2d 1252 (2nd Cir. 1972) defendant was convicted of (1) wilfully failing to file a federal income tax return and (2) wilfully attempting to evade or defeat income tax liability. The Court of Appeals held that (1) was a lesser included offense of (2), and that the conviction as well as the sentence on (1) must be vacated. The Court rejected the Government's contention that the proper remedy was simply to set aside the sentence on (1) and let the conviction stand. The Court said:

"... In light of the comments in Sibron v. New York, 392 U.S. 40, 54-56 (1968) and Benton v. Maryland, 395 U.S. 784, 790-791 (1969), concerning the collateral consequences of convictions, see also United States v. Sabella, 272 F. 2d 206, 210 (2nd Cir. 1959), vacation of the conviction on Count I seems to be required. District Courts must be exceedingly careful in sentencing on multi-count indictments containing lesser included offenses, when there is a serious possibility that an appellate court may find error in the conviction of the more serious offense. For a recent discussion, see United States v. Corson, 449 F. 2d 544 (3rd Cir. 1971)."

(454 F. 2d at pages 1254-1255)

In the instant case the trial judge should have instructed the jury that if they found Sperling guilty on Count Two, they need return no verdict on Count One. In Wright v. United States, 519 F. 2d 13 (5th Cir. 1975), the Court held, respecting a multi-count indictment in a bank robbery case involving a lesser included offense:

"If multi-count indictment is present (sic) to the jury, the trial judge should instruct the jury that it must first consider the most serious count and, if it finds all the elements of that count proved, it must convict under that count

alone, This would be its sole verdict, no response being necessary as to the less serious counts."

In United States v. Maxey, 498 F. 2d 474, 475 (2nd Cir. 1974) in a situation similar to Wright, *supra*, the Court said:

"The jury found Maxey guilty of armed bank robbery in violation of 18 U.S.C. 2113 (d) and of conspiracy. It thus became unnecessary to pass upon a lesser charge (18 U.S.C. Sec. 2113(a) ) in a separate count of the indictment, in accordance with the instructions of the trial judge."

The United States Supreme Court in a very recent case had occasion to reaffirm the lesser included offense doctrine of Prince v. United States *supra* (1957) 352 U.S. 322, and, in so doing, held that the proper remedy is to vacate the conviction as well as the sentence on the lesser offense. United States v. Gaddis, \_\_\_\_ U.S. \_\_\_\_, Case No. 74-1141, decided March 3, 1976.

This is not a case involving overlapping statutes enacted by Congress at different times and with different designs, but rather a case involving overlapping subsections of the same statute and a single enactment, which makes the rule of lenity discussed ante, pages 22-23, particularly applicable. The rule of lenity is not a casual presumption about legislative intent, but a constitutionally compelled canon of construction which requires Congress to specify clearly when overlapping subsections of the same enactment are to allow cumulative convictions and/or punishment. It forbids courts to proliferate convictions and sentences out of legislative silence. It is designed to preclude substantive double jeopardy. Applying the rule of lenity in Ladner v. United States, 358 U.S. 169 (1958) the Court, quoting from United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222 (1952), said: "When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."



POINT 2

COUNT ONE MUST BE CONSTRUED AS DRAWN UNDER THE

GENERAL CONSPIRACY STATUTE (18 U.S.C. 371)

WITH FIVE YEAR MAXIMUM PENALTY

Assuming arguendo that Count One did not merge with Count Two, then Count One, to be valid, must be construed as charging a single conspiracy under the general conspiracy statute (18 U.S.C. 371), as this is the only applicable conspiracy statute that was in effect throughout the entire time span of the conspiracy charged in Count One, from January 1, 1971 to May 11, 1973. The maximum penalty that may be imposed under 18 U.S.C. 371 is five years imprisonment and a \$10,000 fine.

If Count One is not so construed, then it was fatally and incurably defective for duplicity (as will be shown more fully hereinafter), as being bifurcated into two time segments, and charging two separate conspiracies, under two mutually exclusive narcotics conspiracy statutes, both of which were cited in Count One, to-wit, 26 U.S.C. 7237(b) and 21 U.S.C. 846.

The Court's Charge on 18 U.S.C. 371

The Court correctly and no doubt designedly charged the jury that the applicable conspiracy statute was 18 U.S.C. 371. The Court said:

"Now let us turn to the indictment and then to the statutes involved in the indictment. Count 1 charges conspiracy to violate certain federal laws . . . The conspiracy statute, Section 371, Title 18, of the United States Code, provides, in pertinent part, as follows:

"If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons does any act to effect the object of the conspiracy, each shall be guilty of a crime." (R. 4120-4121).

Overt Acts

The

The Court further charged that proof of an overt act was required (R. 4131-4138). This served to cement the application of 18 U.S.C. 371 rather than 21 U.S.C. 846, as an overt act is required for the former, but

not the latter. In United States v. Bermudez, 526 F. 2d 39 (2nd Cir. 1975) the Second Circuit said:

"... In case involving an offense under 21 U.S.C. 846, the conspiracy to distribute narcotics is in and of itself a specific crime. . . an indictment under 21 U.S.C. 846 is sufficient . . . even if it fails to allege any specific overt act in furtherance of the conspiracy." (Citations omitted).  
(526 F. 2d at page 94).

To the same effect:

United States v. Gardner, D.C.Cal.1962, 202 F. Supp. 256

Leyvas v. United States, C.A.Cal. 1967, 371 F. 2d 714

The indictment charged nine overt acts in the Count One conspiracy, and on July 10, 1973, the Government filed a bill of particulars listing eight additional overt acts and stating: "In addition to the overt acts listed in the indictment the Government will prove the following overt acts to meet the overt act requirement of the conspiracy law." (Emphasis added).

#### The Court and the Government Elected

##### to Proceed Under 18 U.S.C. 371

The Court's charge was a judicial election to construe Count One, and to submit it to the jury, as being drawn under the general conspiracy statute. The Government's silence and failure to object to the charge constituted a prosecutorial election to proceed under 18 U.S.C. 371. There is ample authority for this type of election, especially where an election is necessary to prevent or cure duplicity in the indictment. Conduct chargeable under a specific statute may also be charged and punished under a general statute. United States v. Haim, D.C.N.Y. 1963, 218 F. Supp. 922. "It is wholly immaterial what statute was in the mind of the District Attorney when he drew the indictment, if the charges made are embraced by some statute in force." Williams v. United States (1897) 168 U.S. 382, 389. The statute on which an indictment is founded must be determined from facts charged therein, and facts as pleaded may bring offense charged within one statute, although another statute is referred to in the indictment. United States v. McKenney, D.C.N.Y. 1959, 181 F. Supp. 143, aff'd 281 F. 2d 908, cert. den. 366 U.S. 960, rehear. den. 368 U.S. 871.



A good definition of the doctrine of judicial estoppel is found in the case of In re Johnson, 518 F. 2d 246 (10 Cir. 1975), at page 252:

"Under the doctrine of judicial estoppel a party and his privies who have knowingly and deliberately assumed a particular position are estopped from assuming an inconsistent position to the prejudice of the adverse party. This rule ordinarily applies to inconsistent positions assumed in the course of the same judicial proceedings or in subsequent proceedings involving identical parties and questions. See 31 C.J.S. Estoppel, Sections 117, 118 and 119."

As will be shown hereinafter, the election by the Court and the Government to submit the case to the jury as a Section 371 conspiracy is the only thing that saved Count One from being fatally defective. Having thus secured a valid conviction under the theory of a Section 371 conspiracy, the doctrine of judicial estoppel precludes the Court and the Government from invoking a different conspiracy statute for sole purpose of imposing a harsher sentence.

When defense counsel, following the Government's closing summation, raised the time span and sentencing "specters" of Count One (which will be more fully discussed hereinafter) (R. 4090 et seq), the trial judge had already made a mental election and decision to charge on Section 371 as the proper way to prevent or cure the said "specters". The Court admonished defense counsel: "You see, you are presupposing, again, what I will charge as to the law and intrenching on my province. This case has not gone to the jury, and I think that the assumptions that underlie your inquiries can only raise specters that may not at all exist in actuality." (R. 4093). The Court wisely and designedly laid those "specters" to rest with its eminently correct charge on Section 371, which cannot lightly be put aside at time of sentencing.

Ann. 52

Count One is Incurably Duplicious and Defective

Unless Construed as Drawn Under 18 U.S.C. 371

Unless this Court, for re-sentencing purposes, now honors and adheres to its own interpretation of Count One as being drawn under 18 U.S.C. 371, then Count One is fatally and incurably defective for duplicity, as attempting to charge, in a single count, two distinct conspiracies. Count One recites that "part" of the conspiracy charged therein was in violation of 26 U.S.C. 7237(b), which was the "old" narcotics conspiracy statute, repealed May 1, 1971,<sup>9/</sup> and that a "further part" of the conspiracy was in violation of 21 U.S.C. 846,<sup>10/</sup> which is the "new" narcotics conspiracy statute, effective May 1, 1971. These two special narcotics conspiracy statutes are mutually exclusive. The old one terminated, time-wise, when the new one commenced. Furthermore, the two statutes have different and mutually exclusive objects in that the object of the old narcotics conspiracy statute was to violate old law substantive statute 26 U.S.C. 4705(a) which was repealed May 1, 1971, while the object of the new narcotics conspiracy statute was to violate the new substantive statutes 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A) which only became effective May 1, 1971. It is obvious that Sperling could not conspire under the old conspiracy statute to violate substantive laws not yet in existence, and vice versa. The two statutes are mutually exclusive for the additional reason that they have different penalties.

"The vice of duplicity is that there is no way in which the jury can convict of one offense and acquit on another offense contained in the same count. A general verdict of guilty will not reveal whether the jury found the defendant guilty of one crime and not guilty of the others, or guilty of all. It is conceivable that this could prejudice defendant in sentencing, in obtaining appellate review, and in protecting himself against double jeopardy." Wright, Federal Practice and Procedure; Criminal, Section 142. Citing:

United States v. Shackelford, D.C.N.Y. 1957,  
180 F. Supp. 857, 859-860

United States v. Martinez-Gonzales, D.C.Cal. 1950  
89 F. Supp. 62, 64.

<sup>9/</sup> See page 3, ante, for text of 26 U.S.C. 7237(b)

<sup>10/</sup> See page 2, ante, for text of 21 U.S.C. 846



Separate conspiracies cannot be charged in one count. In United States v. Boyle, D.C.D.C. 1972, 338 F. Supp. 1028, 1035, the Court said:

... It must be noted that separate conspiracies cannot be charged in a single count in the indictment. See Kotteakos v. United States, 328 U.S. 756 (1946)."

#### 18 U.S.C. 371 Controls Sentence

As suggested by Professor Wright, supra, duplicity in a count of an indictment "could prejudice defendant in sentencing." <sup>11/</sup> Prejudice in the instant case may be avoided only by sentencing Sperling under the least severe conspiracy statute that is applicable.

In United States v. Shackelford, supra, D.C.N.Y. 1957, 180 F. Supp. 853 (1957) the Court held that where an indictment charged a defendant with conspiring to violate a special narcotics conspiracy statute as well as the general conspiracy statute, and the crimes involved different punishments, the duplicity was more than technical, and the defendant must be sentenced under the least severe of the statutes involved. The Court further held that defendant's failure to object to the indictment on this ground prior to trial was not a waiver of right to object after verdict to duplicitous indictment. <sup>12/</sup>

In Smith v. District of Columbia, D.C.Cir. 1967, 387 F. 2d 233, an information was drawn under two statutes, both of which prohibited the criminal conduct in question, however the defendants did not know with certainty which statute the Government was proceeding under. The Court of Appeals reversed the judgment of conviction, holding:

"... These appellants were entitled to know with certainty the offense with which they were charged and the possible penalty threatened. Under the circumstances they were entitled to a definite reference to the law which they had allegedly violated."

(387 F. 2d at page 237).

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<sup>11/</sup> Wright, Fed. Prac. & Proc. Crim., Sec. 142, supra.

<sup>12/</sup> In instant case there was no waiver, as will be shown hereinafter. See page 40, post.

In Brown et al v. United States, 299 F. 2d 438 (D.C.Cir. 1962), cert. den. sub nom. Thornton v. United States, 370 U.S. 946, the Court was confronted with a sentencing problem in a narcotics conspiracy case. Four conspiracy statutes were involved, including 18 U.S.C. 371, and all had different penalties. The jury did not return a special verdict, and its general verdict did not say whether the defendants conspired to violate one or more of the three severe-penalty conspiracy statutes, or the less severe 18 U.S.C. 371. The Court of Appeals, in an opinion by then Circuit Judge Burger (now Chief Justice), gave the Government the option of letting the defendants be resentenced under the general conspiracy statute, to not more than five years imprisonment, or awarding them a new trial. Confronted with ambiguity in the jury's general verdict, the Court cited with approval United States v. Shackelford, supra, where this Court had met an identically uncertain jury finding, under a general verdict, with a decision to sentence the defendant under the least severe of the statutes involved.

In United States v. Amato et al, S.D.N.Y. 1973, 367 F. Supp. 547, one count of the indictment alleged a conspiracy under both the general conspiracy statute, and another conspiracy statute proscribing certain conduct incident to racketeering. The Court held that if the conspiracy count was submitted to the jury under those conditions, "the court will be required to impose a sentence under the statute providing the least severe punishment," citing Brown v. United States, supra. The Court said:

"(6) A guilty verdict on count one of the indictment, however, will not indicate whether the defendant has been convicted under the general or the special conspiracy section. This creates serious sentencing problems. 8 J. Moore, Federal Practice, 8.03(2) at 8-10 (2d ed. 1969). If count one is submitted to the jury as it now stands and the jury convicts, the court will be required to impose a sentence under the statute providing the least severe punishment."

Amato is particularly applicable to the instant case, as it speaks of the theory under which the case was "submitted to the jury", which theory, in the instant case, was 18 U.S.C. 371, specifically. (R. 4120-4121).



The ambiguity in the above-cited cases arose from conspiracy statutes involving different penalties being cited in the indictment itself. The ambiguity in the instant case arises from the charge to the jury on 18 U.S.C. 371 and the fact that the conspiracy proved violated both 18 U.S.C. 371 and 21 U.S.C. 846, as well as 26 U.S.C. 7237(b). It is true that 18 U.S.C. 371 was not cited in the indictment itself, however this is not significant in view of the Court's charge and the rule stated at page 26, ante, that it is "wholly immaterial" what statute was in the district attorney's mind when he drew the indictment, and that the citation of statute is not controlling. Here, Count One was specifically and purposely "submitted to the jury" as being drawn under 18 U.S.C. 371, which is more controlling, and of greater significance, than the mere citation of 21 U.S.C. 846 tacked onto the end of Count One by the District Attorney.

The Government's So-called "Concession" Did  
Not Cure the "Apparent" Duplicity of Count  
One, Which Could be Prevented, or Remedied,  
Only By Construing Count One as Charging a  
General Conspiracy Under 18 U.S.C. 371

The Government may attempt to argue that the Court's charge on 18 U.S.C. 371 is not binding for sentencing purposes, and that the apparent or potential duplicity in Count One was cured by the Government's concession that there was no proof of pre-May 1, 1971 conspiracy. The record shows that just before the Court charged the jury, Government counsel filed the following unilateral "concession" as Court's Exhibit 145:

"The Govt. concedes, for the purposes of charge of the Court, and sentencing, in this trial, that the proof with respect to the defendants now on trial and charged in Count 1, shows no act by any such defendant prior to May 1, 1971. Accordingly, no 'old' law charge need be given, and sentencing under the new law will be appropriate." (Court's Exhibit 145, filed at 1:30 p.m. 7/11/73; R. 4099).

The foregoing concession was communicated to the jury when the Court charged:

"The government concedes that no act by any defendant on trial was earlier than May 1, 1971, and for purposes of your consideration of the evidence that may be considered as the earliest day of the existence of the conspiracy that is alleged." (R. 4123).

The "Concession" was Spurious

The Government's so-called concession was wholly spurious in that it purported to concede the non-existence of pre-May 1, 1971 conspiracy proof,<sup>13/</sup> whereas such proof did in fact exist and had been elicited in the jury's presence, in overwhelming abundance. The Government purposely had elicited such proof at the trial (much of it over defense objection), had relied on such proof in argument to the jury, and even continued to derive comfort from such proof on appeal. This pre-May 1, 1971 proof of conspiratorial associations, meetings, conversations, and conduct consisted, inter alia, of the following:

Proof to Jury of Pre-May 1, 1971 Conspiracy

Barry Lipsky.

Barry Lipsky, the Government's chief witness, whose testimony linked the Sperling and Pacelli groups, testified concerning conspiratorial conversations and conduct with Pacelli beginning in April 1971, when he and Pacelli had a "series of conversations" which led to Lipsky's moving in to an apartment where Pacelli brought a suitcase and said to Lipsky: "There's 10 kis of junk here . . . From time to time I will be back here. You stay in here with this stuff." (R. 881-886). The Government, in its main brief in the Court of Appeals (Case No. 73-2363 on the original direct appeal) related that Lipsky and Pacelli knew each other since 1969 (Br. 7), and that

"Beginning with this incident in late April 1971, and continuing until February 1972, Lipsky served as Pacelli's chief assistant in the narcotics

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<sup>13/</sup> The Government's cleverly worded concession was not without guile, as will be shown hereinafter under subheading "Trial by Trickery" See pages 42-47, post.



business." (Br. 7). "At Pacelli's request, Lipsky moved into Apartment 2RS at 1420 Third Avenue in Late April 1971 . . . The apartment . . . served as the 'stash' for Pacelli's narcotics . . . During the first two weeks that Lipsky lived in the apartment, Pacelli returned every day or so to pick up one or two of the half kilo packages of heroin from the initial ten kilo quantity" (Br. 8). ". . . Lipsky specified that the conversations in question occurred in April and May 1971" (Br. 89).

The Government also introduced proof that the Lipsky-Pacelli apartment on Third Avenue was vacuum-swept March 29, 1973 and traces of heroin found. There was no evidence as to the exact date the heroin was left there, but the jury could infer that a substantial portion had accumulated from the "10 kis of junk" Pacelli brought there in April 1971 (R. 1513-1515).

Finkelstein.

Jack Stuart Finkelstein, a/k/a Jack Stuart, a/k/a Jack Finkelstein, testified as a Government witness that he had engaged in numerous large scale narcotics transactions with indicted defendant Bless over a period of three years preceding the trial (R. 2725). This was proof of conspiratorial conduct from July 1970 to July 1973, embracing, in one continuum of time, both old and new conspiratorial periods. Jack Stuart Finkelstein's testimony to the jury fills more than 50 pages of the trial transcript. He testified, inter alia, that he had known co-conspirator Jack Bless since 1968 or 1969, or "maybe before" (R. 2724, 2778); that he had participated with co-conspirators in a "number of transactions" involving "20 or 30 kis" of narcotics (R. 2725), selling for \$12,500 to \$14,000 a kilo (R. 2726); that he had dealt with Barry Lipsky, who once picked up "two and a half or three kilos of cocaine" from Finkelstein (R. 2728, 2782-2783). Finkelstein's testimony was elicited over a "continuing objection" by Sperling's attorney (R. 2726). The Government introduced at least four group photographs showing Jack Stuart Finkelstein with numerous other co-defendants and co-conspirators, including,

inter alia, Paselli, Jack Bless, Frank Serrano, Eddie Bless, Albert (Abbe or Abby) Perez, and Barry Lipsky. (Pictures 51, 62, 65 and 164 from GX 15; R. 985, 4291, 4313). Testimony concerning these group photographs was read back to the jury, twice, during its deliberations (R. 4291, 4313). Assistant United States Attorney Valie in his closing argument to the jury relied heavily on Finkelstein's testimony and other evidence linking him to the conspiracy, stating that Finkelstein corroborated Lipsky "one hundred per cent" (R. 4049). Mr. Valie then wrote the names of the conspirators on a large blackboard before the jury (R. 4067) and argued to the jury: "In the center there you see several names that have been circled. Those are persons whose function fit right there in the center of the conspiracy as workers where they would have some familiarity with the functions of other persons. . . . Of course, Stuart's (Finkelstein's) name is circled . . . a person who had daily contact with several of the defendants and had an opportunity to observe the goings on." (R. 4073-4074). The Government's heavy reliance on the Finkelstein link in the conspiracy is further shown by the Government's brief, pages 15, 96-97, in the Court of Appeals, where the Government pointed out that Finkelstein's testimony provided a "conspiratorial link" (Br. 96), and that his photographs with other conspirators confirmed the "close association" of the conspirators (Br. 97). As already noted, Finkelstein's conspiratorial activities extended from July 1970 to July 1973 (R. 2725). And, the Court in charging the jury marshalled the evidence and commented extensively on the "three years" of conspiratorial activities testified to by Finkelstein (R. 4167).

J. M. Lore.

J. M. Lore, a Special Agent of the BNDD, testified to the jury that Lipsky admitted meeting Paselli in "March or April" 1971" (R. 3150, 3151), and that there was a connection between Lipsky and "Jack Stuart, also known as Jack Finkelstein." (R. 3133).

Juan Jose Serrano.

Juan Jose Serrano, a co-defendant who was convicted, was cross-examined by Mr. Valie, who elicited testimony that Serrano gave Lipsky a ride on his motorcycle in 1971, which he had bought in 1970, for \$2,700.00 cash (R. 3324-3325); that he had been driving a gray Mercedes since 1970, for which he



paid \$8,200.00 cash (R. 3326, 3358); that had known Pacelli since 1964 (R. 3339). Mr. Velie then argued to the jury:

"And what about Juan Jose Serrano, the one who . . . bought his motorcycle for cash, \$2,700.00, bought the Mercedes for cash . . . a lot of cash floating around" (R. 4054).

This evidence was also relied on by the Government in the Court of Appeals, where the Government related that Serrano met Pacelli in 1965 (Br. 45) and that "In addition to the motorcycle, Serrano also drove a Mercedes automobile which he purchased for \$8,200.00 in cash" (Br. 50, footnote).

Susan Weyl.

Susan Weyl testified as a Government witness that she met Pacelli in 1970, Lipsky in 1971, and later allowed them to use her apartment as a "stash" (R. 1422-1445). This testimony was adverted to by the Government in the Court of Appeals (Govt. Br. 20).

Fred Berger.

Fred Berger testified to the jury that he knew Pacelli and Lipsky since late 1970 or early 1971 (R. 3061-3062, 3069), which was mentioned by the Government in the Court of Appeals (Br. 51).

Vincent Pacelli Jr.

Vincent Pacelli Jr. (a co-defendant whose trial was severed late during the trial) testified under cross-examination by Mr. Velie that he met Sperling "five or six years ago" (R. 3605); started seeing him again in 1971 (R. 3606), "pretty frequently" (R. 2608); that he had known co-defendant Juan Serrano since 1964 (R. 3609); that he knew co-defendant Edward Bless "10 or 11 years" (R. 3611); knows Jack Stuart Finkelstein (R. 3633), and did not file a tax return in 1970 or 1971 (R. 3627).

Government's Closing Summation.

Mr. Velie in closing argument to the jury commented on Herbert Sperling's 1971 tax return (R. 4057). Mr. Velie also told the jury that the conspiracy charged in Count One was "described in the government's proof" (R. 4060). In closing argument Mr. Velie did not suggest or "concede" to the jury that the government's proof did not apply to the entire time span of the first

count. The Government's attorney at no time personally stated to the jury that he did not rely on all the evidence that had been admitted. He waited until all the argument was concluded, including his own, to file his cleverly worded "concession", which the jury did not see, and which the jury was advised of in one sentence, that was buried in the Court's lengthy charge.

Other proof of pre-May 1, 1971 conspiracy.

Testimony that is ambiguous as to precise dates is found throughout the record. Government witnesses testified as to conspiratorial conduct that occurred "in 1971", or in the "Spring of 1971", without saying whether the event was pre- or post-May 1st. <sup>14/</sup> Defense counsel, not being privy to the game plan of the prosecutor (Mr. Velie) to withdraw pre-May 1st proof from the jury at the eleventh hour, did not insist on precise dates, thus leaving the jury free to speculate as whether the evidence was pre- or post-May 1st.

The Court's Charge on the Government's Concession

Did Not Cure the Apparent Duplicity of Count One

The Government's so-called concession, being both spurious and untimely, did not gain validity merely by the Court's communicating it to the jury. The Court's one-sentence charge on the concession (R. 4099) did not erase from the jury's mind the pre-May 1, 1971 proof. Other parts of the Court's charge attenuated and contradicted the one brief reference to the so-called concession. For instance, the Court charged that the Government was "not required to prove that the conspiracy began on a specific day or ended on a specific day" (R. 4123), and that all the conspirators need not have participated in the conspiracy at its inception, but that in order to be guilty, one who "comes in later" may become a member of the conspiracy and is legally responsible for all acts by other members "before and afterwards". (R. 4132). This is no doubt a correct general instruction of the conspiracy law, but under the peculiar circumstances of the instant case, where the Count One conspiracy, as returned by the grand jury, straddled the iron curtain date of May 1, 1971, more than one sentence in the Court's charge was required to effectively withdraw from the jury's mind the voluminous pre-May 1st evidence.

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<sup>14/</sup> See Lipsky's testimony at R. 909, 958, 1097; Berger at R. 3090, and Sperling's cross-examination about his association with the "Frenchman" without giving dates (R. 2937-2939). The record is replete with other testimony that is ambiguous as to dates.



The Court not only failed to categorically charge the jury to disregard pre-May 1, 1971 proof of conspiracy, but pointedly called their attention to such evidence:

"Turning to Jack Bless, who is named in the conspiracy count . . . the government contends that the evidence as to Jack Bless shows . . . that Jack Bless sold cocaine to Jack Stuart Finkelstein on numerous occasions, and . . . that the proof shows that in a period of three years Jack Stuart Finkelstein obtained 20-30 Ki's of cocaine from Jack Bless in a number of transactions paid for in cash. Deliveries were made to Stuart's apartment in half-kilo packages. Further, that Bless stated to Lipsky that there was always at the disposal of himself, his brother and a third man the sum of \$250,000.00 in cash to grab a load any time it came in; that the job of the Blesses was to get rid of all the junk that this third man gets for them." (R. 4167).

There is authority for the proposition that where a count of an indictment charges two separate offenses, the Government may elect upon which charge it will rely, and the defendant is not harmed if the proof is limited to only one of the charges in the duplicitous count. This rule does not apply in the instant case, as there was abundant proof of the pre-May 1st conspiracy, the jury heard such proof, and such proof was not effectively withdrawn from their consideration.

If this Court nevertheless holds that allegations and proof of the pre-May 1st conspiracy were effectively withdrawn by the Court's instruction and by amendment of the indictment, then, and in that event, all of Count One was fatally infected by an impermissible amendment, as will be demonstrated under the following point.

POINT 3

IF THE ALLEGATIONS AND PROOF OF PRE-MAY 1, 1971  
CONSPIRACY WERE EFFECTIVELY WITHDRAWN FROM THE  
JURY, THEN COUNT ONE WAS IMPERMISSIBLY AMENDED  
IN VIOLATION OF THE FIFTH AMENDMENT

Assuming arguendo that the allegations and proof of the pre-May 1, 1971 portion of the conspiracy were effectively withdrawn from the jury's consideration by the Court's charge on the Government's so-called concession, and by the Court's physical amendment of Count One of the indictment, then Count One was impermissibly amended, and was void, and the verdict returned on Count One nullity.

In addition to orally instructing the jury that May 1, 1971 "may be considered" as the earliest day of the existence of the conspiracy that is alleged," (R. 4123), the Court also physically amended the face of the indictment. Immediately after the jury retired to deliberate, the Court said to Government counsel:

"THE COURT: Now if the indictment is sent for, what I would like to do is line out or Xerox out any reference to the so-called old law which I excluded by the charge. Can you arrange to Xerox that page with a cover on that and . . . if it is called for, we will have it ready? this is not the original, but it is good for Xeroxing purposes . . . Put an S with a slash and write the name Seymour above the line . . ."

(R. 4238-4239).

Government counsel at the Court's direction thereupon performed major surgery on the indictment, excising the one-half of Count One which was considered by the Court to be malignant. The date change and deletion of half of the charging part of Count One are indicated by red print and red line at page 4, ante.



The Amendment Was Neither Trivial, Useless, nor Innocuous

It is obvious that the changed and deleted portions of Count One (page 4, ante) related to matters of substance, hence did not come within any of the exceptions which permit corrections of typographical errors, misnomer, aliases, irrelevant surplusage, and other matters of form.

The rule that the Court may, in certain instances, "narrow" a count of an indictment by withdrawing part of it from the jury's consideration applies only in cases where no evidence of the withdrawn portion was presented to the jury. Furthermore, such "narrowing" of the charge may be effected only by the Court's oral instruction, and may not be done by physically amending the face of the indictment.

"If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed."

Ex parte Bain (1887) 121 U.S.1

Federal courts are without power to alter or amend indictments found by a grand jury. United States v. Kreoper, 159 F. 2d 958 (3 Cir. 1946) cert. den. 330 U.S. 824.

Since an indictment is returned under oath by the grand jury, it can only be superseded by an indictment of equal solemnity. Bigrow v. Hiatt, D.C.Pa. 1947, 70 F. Supp. 836, adhered to D.C.Pa. 1947, 84 F. Supp. 240, affirmed 168 F. 2d 992 (3 Cir. 1948).

An amendment is not proper if matter is "neither trivial, useless, nor innocuous." Stirone v. United States (1960) 361 U.S. 212, 4 L. Ed. 2d 252.

To same effect: Marx v. United States, 344 F. 2d 317, 320-322

Absent the pre-May 1, 1971 allegations in the charging part of Count One, the grand jury might not have found a true bill. In Ex parte Bain, supra, the court reasoned that trial on an amended indictment is constitutionally repugnant because there is no way of knowing whether the grand jury would have returned the indictment, as amended, if they had been given the opportunity.

Amendment of indictment occurs when charging terms of indictment are altered either literally or in effect by prosecutor or the court after the grand jury has last passed upon them.

Gaither v. United States, 413 F. 2d 1061 (D.C.Cir. 1969)

United States v. Robinson, 475 F. 2d 376, 385 (D.C.Cir. 1973)

United States v. Griffin, 463 F. 2d 177, 178 (10 Cir. 1972)  
cert. den. 409 U.S. 988

If an amendment of indictment goes to an essential element of crime, it is a substantial change and cannot be made except by resubmission to grand jury. United States v. Fischette, 450 F. 2d 34 (5 Cir. 1971) cert. den. 405 U.S. 1016.

"Non-essential detail in an otherwise good indictment does not invalidate it, but, where grand jury indicts under one statute, conviction may not be had under another by device of discarding essential averments as surplusage." Bratton v. United States, 73 F. 2d 795 (C.C.A. Okla 1934). To same effect: United States v. Smith, 232 F. 2d 570 (3 Cir. 1956), and United States v. Goodwin, 20 F. 237.

It is immaterial whether the trial jury saw the physically amended indictment, as the Court may not materially change an indictment by its instruction to the jury. United States v. Alaimo, 297 F. 2d 604 (3 Cir. 1961) cert. den. 369 U.S. 817

In Edgerton v. United States, 143 F. 2d 697 (9 Cir. 1944), the change in question was not one of mere form, or the ignoring of an innocuous averment, but rather one affecting substance. The Court held that such changes cannot be made by an instruction of the judge to the jury any more than they can be made by the actual physical alteration of the indictment. So construed, Edgerton stands for the same principles as enunciated by the Supreme Court in Stirone v. United States, supra, 361 U.S. 212, 214, and Russell v. United States, 369 U.S. 749, 8 L. Ed. 2d 240 (1962), to-wit, that the court may not



by any means (e.g., physical alteration, jury instruction, or bill of particulars) alter the material and essential nature of an indictment. Edgerton prohibits the alteration of an indictment by instruction where the alteration affects the substantial rights of the defendant.

In Carney v. United States, 163 F. 2d 784 (9th Cir.) cert. den., 332 U.S. 824 (1947) the court held that actual and physical striking out of words on the face of an indictment was impermissible.

#### There was No Waiver by Sperling

Sperling did not waive his right to be tried on an indictment as returned by the grand jury. He did not consent to the amendment which was a bilateral project of the Court and the prosecutor. He had no prior notice that the Government was going to make an eleventh hour "concession" which would lead to amendment of the indictment. Following the Court's charge on the Government's concession, Sperling's counsel made a timely objection, stating:

"MR. LA PORTE: I think that the Government failed to prove the allegations of the conspiracy count and has admitted in essence that the conspiracy is not the one that they charged and that it only came into existence on May 1st, not January 1st, thereby being an amendment to the <sup>15A/</sup> indictment."

(R. 4195).

#### The Amendment was Unnecessary to Cure Duplicity, as there Is no Duplicity to Cure if Count One Is Construed as Drawn under 18 U.S.C. 371

As noted previously in this brief, there is authority for the proposition that where a count of an indictment charges two separate offenses, the Government may elect upon which charge it will rely, <sup>15/</sup> and the defendant is

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<sup>15/</sup> Franklin v. United States, 330 F. 2d 205, 207 (D.C.Cir. 1964) -  
Thomas v. United States, 418 F. 2d 567 (5 Cir. 1969)  
Reno v. United States, 317 F. 2d 499 (5 Cir. 1963)

<sup>15A/</sup> Absence of waiver is further shown by Sperling's motion for new trial (paragraph 3 of motion), and motion to arrest judgment, based on ground that Count One of indictment was defective.

not harmed if the proof is limited to only one of the charges in the dupli-  
citous count. <sup>16/</sup> This rule, however, is not applicable to the instant  
case, because (1) Count One as returned by the grand jury is not duplicitous  
if properly construed, as the Court did in submitting it to the jury, as  
charging a conspiracy under 18 U.S.C. 371, and (2) the proof adduced to the  
jury was not limited to the post-May 1, 1971 conspiracy, as shown ante, pages  
31-35.

There is no rule of law and no precedent for amending a perfectly good  
and valid indictment for the sole purpose of enabling a greater sentence to  
be imposed than would be possible without the amendment. The Government prop-  
erly proved a single conspiracy under 18 U.S.C. 371 which was in effect during  
the entire time span of Count One as the grand jury returned it. It was proper  
to prove both pre- and post-May 1st conspiratorial conduct under 18 U.S.C. 371,  
as a single conspiracy may have multiple objects. Count One was duplicitous  
only if improperly construed as drawn under the special narcotics conspiracy  
statutes, neither of which covered the entire time period of Count One as  
originally drawn. If Count One was treated as a Section 371 conspiracy, this  
problem did not exist, and there was no duplicity, hence no need for amendment.

#### SPERLING WAS PREJUDICED BY THE AMENDMENT

##### Double Jeopardy.

One test of the sufficiency of an indictment is whether it enables a  
defendant to plead double jeopardy in subsequent prosecutions. Hagner v.  
United States, 385 U.S. 427, 431; United States v. Goodman, 457 F. 2d 68, 73  
(9 Cir.) cert. den. 406 U.S. 961 (1972). Count One as returned by the  
Grand Jury protected defendant Sperling against a subsequent prosecution for  
a pre-May 1, 1971 narcotics conspiracy; but following the physical amendment  
of Count One, deleting the pre-May 1st allegations, protection against a sub-  
sequent prosecution for a pre-May 1st conspiracy no longer existed.

##### Sentence.

As already stated, amendment of the indictment enabled the Court to  
treat Count One, for sentencing purposes, as being drawn under 26 U.S.C. 846  
permitting a sentence of 30 years imprisonment and \$50,000 fine, which the  
Court imposed; whereas, if the indictment had not been amended, the Court  
would have been obliged to impose sentence under provisions of 18 U.S.C. 371,  
with maximum of five years imprisonment and a \$10,000 fine.

16/ United States v. Gibson, 310 F. 2d 79, 80-81 (2 Cir. 1962)

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Trial by Trickery.

Sperling was doubly prejudiced by the "timing" of the Government's so-called concession, which led to amendment of the indictment, and resulted in trial by trickery.

In retrospect it is crystal clear that the Government knowingly and deliberately put the pre-May 1, 1971 conspiracy allegations in Count One for purpose of getting pre-May 1, 1971 proof before the jury, intending all along to get as much benefit as possible from the pre-May 1, 1971 allegations and proof, then to "concede" at the last minute that there was no pre-May 1, 1971 conspiracy, after all. The problem of the May 1, 1971 iron curtain which separated the old and new narcotics conspiracy statutes was called to the Government's attention by a motion filed by Sperling's counsel to dismiss the indictment and / or to sever Count One. Nevertheless the Government, after the motion was filed and partially argued, obtained a superseding indictment, on which Sperling was tried, without correcting the time span problem of Count One. Prior to trial the Government and the Court were put on notice of the problem arising from repeal of old laws and adoption of new laws, effective May 1, 1971. In arguing the motion to dismiss indictment, sever Count One, etc., Sperling's attorney stated:

"MR. LA PORTE: Your Honor, we are here  
on a motion to dismiss the indictment . . ."  
(R. 2). "If you go to Section 4705(a)  
. . . that Section was repealed effective  
May 1, 1971. . . I think it would be difficult to conspire and agree to violate a repealed statute." (R. 7) "So we go on to Section 812 and that section took effect on May 1, 1971. . . And I am asking if they were conspiring to violate a law that had not even taken effect yet." (R. 10-11)  
". . . At the conclusion of the conspiracy count . . . they give the section . . . violated, which is Section 846 of Title 21 . . . that section did not even come into effect

until May 1, 1971. And again I go back to the beginning of this conspiracy count, which says that the conspiracy is alleged to have occurred from January 1, 1971 . . . they are alleged to have violated a Section of the code that was not even in existence on January 1, 1971."

(R. 13).

The Court, in response to Mr. LaPorte's motion, made the following comments and ruling:

"THE COURT: I say, you are not confused by it. You know that can only refer to a conspiracy that ended May 1, 1971." (R.8).

"There are other sections . . . that carry forward from May 1, 1971" (R. 9).

"I don't think there is much I can do about that. The motion to dismiss is in all respects denied." (R. 5-16).

The trial judge probably made the foregoing ruling and comments in all good faith, not being privy at that time to the Government's game plan, all of which became clearer as the trial progressed, and was indeed transparent in the bright light of hindsight. The record contains numerous clues to the game plan and trickery which was known only to Government counsel, Mr. Velie, but was not revealed to defense counsel until the game was over.

Item: Mr. Velie's closing argument to the jury shows that he was well aware of the Count One time span problem, and intended all along not to let the jury see Count One of the indictment, at least not in its original form. Mr. Velie was perfectly willing for the jury to see the "substantive" counts of the indictment, but not Count One. Consider this clue,



during Mr. Velie's closing argument, and prior to his so-called concession and amendment of the indictment:

"MR. VELIE: . . . I understand that a copy of the indictment will be sent in to you so you can actually read what is charged in the substantive counts. But you will - -

"THE COURT: It hasn't been sent in yet but it may be sent in if requested.

"MR. VELIE: If you wish to have the substantive counts to consider the indictment is available to you and you may ask for it. The first count charges conspiracy alleged here and described in the government's proof."

(R. 4079-4080)

Obviously, Government Counsel, Mr. Velie, had something in mind about Count One and about amending the indictment that was not yet known to defense counsel.

Item: After Mr. Velie finished his argument, defense counsel brought up the subject of the May 1, 1971 dividing date and pointedly asked what the Government contended, and suggested that perhaps a special verdict should be taken. (R. 4090 et seq). Mr. Velie still pretended he did not know what position the Government would take, and gave no warning of the "concession" he planned to surprise defense counsel with thirty seconds before the Court charged the jury. When defense counsel persisted in pursuing the matter the Court pretermitted all discussion, stating: "You see, you are presupposing, again, what I will charge as to the law and entrenching on my province. This case has not gone to the jury, and I think that the assumptions that underlie your inquiries can only raise specters that may not at all exist in actuality." (R. 4093). "We will go to lunch now." (R. 4094).

Item: The Government's "concession" was filed after lunch and immediately before the Court charged the jury, taking all defense counsel by surprise and depriving them of an opportunity to re-think the

defense strategy. The Court's charge on 18 U.S.C. 371 was likewise a complete surprise to all defense counsel. Had they known prior to oral argument of the anticipated "concession" and the anticipated 18 U.S.C. 371 charge, they could have tailored their argument to the jury, and their requests for instructions to the jury, accordingly. They could have demanded a stipulation that sentence would be pursuant to 18 U.S.C. 371, had they known the conspiracy count was going to be submitted under that section. They could have argued to the jury the Government's "admitted" failure to prove what it had alleged in Count One. They could have moved to strike all evidence of the pre-May 1, 1971 part of the conspiracy. They could have moved for a mistrial because of the admission of such evidence, on the ground that it could not be erased from the jury's mind by simple instruction.

Item: The late and untimely amendment of indictment and withdrawal of old law allegations and proof from the case enabled the Court to use the old law (pre-May 1, 1971) allegations in Count One as basis for denying Sperling's attorney's pretrial motion to dismiss Count One. Mr. LaPorte on May 25, 1973, had moved to dismiss Count One on the ground that "a group conspiracy as charged in Count One is a logical and necessary prerequisite to commission of the substantive offense charged in Count Two." The Court denied the motion primarily on the ground that time spans of Count One and Count Two were not "coterminous". If the Government had made its "concession" at that time, the Court would have had no ground for denying the pretrial motion to dismiss Count One.<sup>17/</sup> This is another example of how Sperling was prejudiced by the Government's clever and devious "timing" of its so-called concession and resultant charge of the Court and amendment of indictment.

Item: By delaying its "concession" until all the evidence was in, both pre-and post-May 1, 1971, the Government prevented defense

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<sup>17/</sup> An added reason given by the trial judge for denying motion to dismiss Count One, and for holding that Count One did not merge into Count Two, was that different groups of conspirators were involved in the two counts. However the bill of particulars, the evidence and the Court's charge showed that at least 9 conspirators were common to the two counts; moreover, the Court charged that guilt was individual in the conspiracy, and during a pretrial hearing implied that the adding of two names to the conspiracy count would not affect Sperling individually, one way or the other (Sperling Appendix 28h). Page 71



counsel from interposing timely objections to testimony of pre-May 1, 1971 conspiratorial conduct, especially hearsay declarations occurring prior to May 1, 1971, as defense counsel was lulled and deceived into believing that Count One would be submitted to the jury as charging both a pre- and post-May 1, 1971 conspiracy. For the same reason defense counsel did not demand specificity from numerous government witnesses as to dates, believing that since the conspiracy charged in Count One straddled the May 1st dividing line, it was immaterial whether events and hearsay declarations testified to by Government witnesses as occurring "in 1971" or in the "Spring of 1971" were pinpointed as pre- or post-May 1, 1971. The rule is well-established that hearsay declarations of a co-conspirator to be admissible against a co-conspirator must occur "during the existence of the conspiracy." Wharton's Criminal Evidence, Vol. 2, Sec. 428, page 198 (12th Ed. 1955); See, also, Brown v. United States, 150 U.S. 93. Taking the Government's concession and the amendment to the indictment at face value, the Count One conspiracy was not in "existence" prior to May 1, 1971, as the underlying statutes had not been enacted yet, hence all pre-May 1, 1971 hearsay declarations were clearly inadmissible and would have been timely objected to and excluded or stricken if Government counsel had not deviously waited until just before the Court charged the jury to fob off the spurious "concession". Moreover, the testimony of Sperling, other defendants, and defense witnesses might well have been different had they known of the Government's planned "concession." In United States v. Russano, 257 F. 2d 712 (2 Cir. 1958) the indictment charged a continuing conspiracy from 1951 to 1957 but there the proof disclosed two conspiracies in those years which the indictment had lumped together. It was held that this prejudiced the defendant by allowing admission of evidence not otherwise admissible.

Item: Mr. Valie's cleverly worded "concession" appears on first blush to say there is no proof whatsoever of pre-May 1, 1971 conspiracy, but on closer examination is shown to say only that the pre-May 1, 1971 proof shows no "act" by any defendant "now on trial." This crafty wording does not exclude the conspiratorial acts or hearsay testimony of Lipsky and Finkelstein who were unindicted conspirators, or of Pacelli who was severed. Lipsky, Finkelstein and Pacelli were not "defendants now on trial". The Government's "concession", therefore, was actually a "non" concession.

In sum: Machiavelli himself would have been titillated by the nuances and subtleties of the Count One metaphysics, involving as it did a pre-May 1, 1971 conspiracy that conveniently disappeared at the right time for the Government; a concession that was not a concession; the Court's charge on the Government's non-concession followed by a lengthy marshalling of pre-May 1, 1971 evidence (R. 4167) and failure to strike such evidence from the record; capped off by an amendment that was not an amendment, as the physical alteration was done to a copy of the indictment rather than the original. These shenanigans were obviously designed so as to leave open an avenue of retreat for the Government if and when an attack should be made on any particular phase of the prestidigitation it performed on Count One.

#### How to Cure Prejudice

The only way to cure the prejudice suffered by Sperling on account of the Government's spurious concession leading to an amendment of indictment is to vacate the conviction and sentence on Count One, or, alternatively, to resentence Sperling pursuant to penalty provisions of 18 U.S.C. 371, with maximum penalty of five years imprisonment plus a \$10,000 fine.

#### POINT 4

#### IF SPERLING IS RE-SENTENCED AS A SECOND OFFENDER

#### UNDER 21 U.S.C. 846, THE MAXIMUM LEGAL PENALTY

#### IS TWO YEARS AND A \$10,000.00 FINE

The jury could have found that the object of the conspiracy, as to Sperling, was simple possession of cocaine, for which the maximum penalty under the special narcotics conspiracy statute, 21 U.S.C. 846, is two years and a \$10,000 fine for a second offender.

The Court in charging the jury did not clearly define and limit the objects of the conspiracy to distributing or possessing with intent to distribute heroin or cocaine. The jury could have inferred, from the Court's charge, that Sperling was guilty of the Count One conspiracy solely on the basis of his simple possession of a small amount of cocaine that was wrapped in a one dollar bill



and taken from his person when he was arrested. The Court charged:

"Count 1 charges conspiracy to violate certain federal laws" (R. 4120-4121).

"I will now mention the statutes, the Federal Narcotics Laws which the defendants are charged with scheming to violate. The Comprehensive Drug Abuse Prevention Act of 1970 is a law which was passed by Congress. . . The part of this Act which is applicable to the charges here is called the Controlled Substances Act. . . It is not necessary for you to remember the names of the Acts or their applicable parts. It is sufficient if you remember the conduct which the Act forbids and the essential elements of the offenses here charged. . . Among other things it makes it unlawful for any person to knowingly or intentionally distribute or possess with intent to distribute any controlled substances such as heroin or cocaine. In addition, any person who conspires to commit any such offense commits a crime." (R. 4121-4122). . .

"Now, as to Herbert Sperling, who is named in the conspiracy, Count 1 . . . the government points to the arrest of Sperling and contends he was in possession of a small amount of cocaine, and had a gun, rubber surgical gloves with traces of cocaine on them, in the glove compartment of the car he drove, and traces of heroin in the trunk of that car . . . Defendant Sperling admits . . . small purchases of cocaine which he snorted." (R. 4160-4163).

The Court further charged, respecting conspiracy, that if two or more persons conspire to commit "any" offense against the United States, and one of them does "any" act to effect the object of the conspiracy, each shall be guilty of a crime. (R. 4120-4121).

It is true that in the early part of its charge the Court told the jury that Count One charged the defendants with conspiring to violate the narcotics laws by "distributing or possessing with intent to distribute heroin or cocaine" (R. 4103), but then later the Court attenuated the early statement by charging that the narcotics laws made distributing, etc., a crime "among other things" (R. 4121-4122), and finally made the charge even more open-ended by charging that Sperling, "who is named in the conspiracy . . . was in possession of a small amount of cocaine, and had a gun . . . Sperling admits . . . small purchases of cocaine which he snorted." (R. 4160-4163). This open-ended and dragnet charge fell short of limiting the objects of the conspiracy to the more serious crime of distributing or possessing with intent to distribute. At no point did the Court impress upon the jury the distinction between simple possession, and possession with intent to distribute.

Now that the Court of Appeals has reversed convictions of several co-defendants in this case on counts wholly dependent on testimony of Lipky, his testimony pertaining to the Count One conspiracy should be disregarded altogether, and it is very likely that if the jury were to again deliberate on Count One, without Lipky's testimony, they might very well disbelieve Conforti, which would leave very little evidence of Sperling's guilt on Count One other than his admitted simple possession of a small amount of cocaine. It is impossible at this time to know whether the jury in finding Sperling guilty on Count One relied on the testimony of Lipky, or Conforti, or neither. It can be said with assurance, however, that they considered Sperling's admission that he was in possession of small amount of cocaine, as the Court pointedly called their attention to the Government's contention concerning this cocaine, and Sperling's admission.

The phrase "among other things" if used in the charging part of an indictment is prejudicial, as a defendant might be convicted for matters not considered by the grand jury. United States v. Pope, D.C.N.Y. 1960, 189 F. Supp. 12, 25; United States v. Mays, D.C.N.Y. 1964, 230 F. Supp. 85. The phrase "among other things" is no less prejudicial when used in the Court's charge to the jury. In the instant case the phrase "among other things", coupled with



the broad language of 18 U.S.C. 371 which the Court read to the jury (i.e., "any" offense and "any" act), certainly gave the jury carte blanche to convict Sperling of simple possession of the cocaine he had when arrested, or, for that matter, the gun he had in possession, or just on general principles.

Taken as a whole, the Court's charge did not give a clear instruction of the elements of the substantive offenses which were the object of the Count One conspiracy, as its original instruction, which was correct (R. 4103) was broadened later in the charge by use of words "any", "among other things," and a recitation of the Government's contentions regarding the cocaine Sperling had when arrested. In United States v. Yasbin, 159 F. 2d 705, a conspiracy conviction was reversed where the trial judge charged on elements of crime of conspiracy but did not instruct on elements of the substantive offenses involved in the conspiracy. The incorrect charge in the instant case was as bad as no charge at all, by reason of the Court's failure to limit the elements of the substantive offenses to distributing or possessing with intent to distribute.

The penalty for simple possession of cocaine (substantive offense) is one year and a fine of not more than \$5,000 for a first offense, and double that for a second offense. 21 U.S.C. 844 (page 1, ante). A conspiracy to violate this statute is punishable to the same extent that the substantive crime is punishable, pursuant to the penalty provisions of the special narcotics conspiracy statute, 21 U.S.C. 846. Therefore, if this Court rejects Sperling's contentions set forth under Points 1, 2 and 3, ante, then the Court in re-sentencing Sperling on Count One, under provisions of 21 U.S.C. 846, may impose a sentence not in excess of two years and a \$10,000 fine, assuming Sperling is re-sentenced as a second offender.

#### CONCLUSION

For the foregoing reasons, the sentence and conviction on Count One should be vacated, and Count One should be dismissed, with prejudice. Alternatively, Sperling should be re-sentenced pursuant to 18 U.S.C. 371 to not more than five years imprisonment and a \$10,000 fine. Alternatively, if re-sentenced pursuant to 21 U.S.C. 846, the sentence must not be in excess of two years imprisonment and a \$10,000 fine, for conspiracy to commit the offense of "simple possession of cocaine in violation of 21 U.S.C. 844.

Respectfully submitted

Herbert Sperling  
HERBERT SPERLING  
Defendant-Movant, Pro Se  
Box FMB 78271

AFFIDAVIT AND  
CERTIFICATE OF SERVICE

I certify this \_\_\_\_\_ day of \_\_\_\_\_, 1976, that  
I have mailed a copy of the foregoing memorandum of law, first class  
postage prepaid, to counsel for the Government, addressed as follows:  
United States Attorney, 1 St. Andrews Plaza, New York, N.Y. 10007.  
I further certify that the facts stated therein are true.

Herbert Sperling  
HERBERT SPERLING  
Defendant-Movant-Affiant, Pro Se  
Box FMB 78271

(Authorized by the Act of July 7, 1955,  
to Administer Oaths (18 U.S.C. 4004))



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA :

-v- :

73 Cr. 441 (MP)

HERBERT SPERLING, :

Defendant. :

-----x

MEMORANDUM OF LAW

ROBERT B. FISKE, Jr.  
United States Attorney for the  
Southern District of New York  
Attorney for the United States  
Of America

JAMES P. LAVIN  
Assistant United States Attorney  
Of Counsel

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- -x

UNITED STATES OF AMERICA :

-v- :

HERBERT SPERLING, :

73 Cr. 441 (MP)

Defendant. :

----- -x

MEMORANDUM OF LAW

This memorandum of law is submitted in opposition to the pro-se motion of the defendant Herbert Sperling pursuant to title 28 United States Code §2255 for dismissal of Count I (Conspiracy) of the above indictment on various grounds and/or to be resentenced under 18 U.S.C. §371 or 21 U.S.C. §844.

Statement of Facts

Superseding Indictment 73 Cr. 441, filed May 11, 1973, charged Herbert Sperling and seventeen others in twelve counts with various violations of the federal narcotics laws. Count one charged all the defendants and six additional co-conspirators with conspiracy to

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violate the federal narcotics laws commencing on January 1, 1971 and continuing until May 11, 1973, the date of filing of the indictment. Count Two charged Herbert Sperling with organizing and supervising a continuing criminal narcotics enterprise, inviolation of Title 21, United States Code, Section 848. In addition, Sperling, along with others, was charged in Counts Eight, Nine and Ten with distributing and possessing with the intent to distribute one kilogram of cocaine in July, 1971, two kilograms of heroin in November, 1971, and one kilogram of cocaine in December, 1971.

Trial commenced on June 18, 1973, before the Honorable Milton Pollack, United States District Judge, and a jury, and on July 12, 1973, the jury found eleven defendants, including Sperli, guilty on all counts in which they were named.

On September 12, 1973, Judge Pollack sentenced Sperling to life imprisonment and a \$100,000 fine on Count Two. In addition Sperling was sentenced to concurrent terms of 30 years imprisonment, to be followed by six years special parole, on each of Counts One, Eight, Nine

and Ten and to a \$200,000 fine.

On October 10, 1974, the Court of Appeals affirmed Sperling's convictions on Counts One and Two and reversed and remanded for a new trial on Counts Eight, Nine and Ten. United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974). The Court also directed that, in view of the reversal of those Counts Sperling be re-sentenced on Count One (the Conspiracy Count). The mandate issued on January 30, 1975.

On March 3, 1975, Sperling's petition for a writ of certiorari was denied by the Supreme Court. Sperling v. United States, 420 U.S. 962 (1975). An order of nolle prosequi was filed in District Court on May 16, 1975, dismissing Counts Eight, Nine and Ten of Indictment 73 Cr. 441 as to Sperling.

By notice of motion dated July 3, 1975, Sperling moved before Judge Pollack to vacate the order of nolle prosequi and for a new trial on those counts - "whereby he may prove his innocence"- or, in the alternative, to have the order of nolle prosequi amended so as to dismiss Counts



Eight, Nine and Ten with prejudice. Judge Pollack denied Sperling's motion by order filed July 24, 1975. Sperling's appeal from that order was dismissed by the Second Circuit on January 26, 1976.

THE RELIEF SPERLING REQUESTS IS NOT  
AVAILABLE UNDER TITLE 28, UNITED  
STATES CODE, SECTION 2255.

As the Second Circuit held in United States v. Wright, 524 F.2d 1100, 1101 (2d Cir. 1975)

[n]ot every error of law may be successfully asserted in proceedings under [§2255]; the error must be fundamental one which inherently results in a complete miscarriage of justice. Davis v. United States, 417 U.S. 333, 346 (1974). Furthermore where constitutional issues are absent, a defendant who fails to request relief patently available to him on the trial or through regular avenues of appeal may be precluded from subsequently securing it through collateral means. Id at 1101-1102 (citations omitted)

None of the issues now presented by Sperling were raised in the trial court or on his direct appeal.\*

\* During the pre-trial proceedings the defendant Sperling by way of a motion claimed that by charging him with both the conspiracy (Count I) and the 21 U.S.C. §848 charge the government violated the "Wharton" rule. The Trial Court in a memorandum opinion dated May 30, 1973 denied that motion. Sperling included his motion papers and the opinion in his appendix to the Second Circuit but did not raise it in his brief. (See Appendix of the Appellant Herbert Sperling. Dkt. No. 73-2363, Vol 2 at A.44-A.49.) Sperling has now apparently abandoned that argument.

Thus Sperling has deliberately by passed the orderly federal procedures provided by way of appeal under Fed. Rule App. Proc. (4b) and his \$2255 motion should be denied on this ground alone; especially since no constitutional issues are asserted. Davis v. United States, 417 U.S. 333, 345 n.15 (1974); Kaufman v. United States, 394 U.S. 217, 227n 8 (1969); United States v. West, 494 F.2d 1314 (2d Cir. 1974), cert. denied, 419 U.S. 899 (1975); United States v. Travers, 514 F.2d 1171, 1173 (2d Cir. 1974).

CONSPIRING TO VIOLATE THE FEDERAL NARCOTICS  
LAW UNDER TITLE 21 U.S.C. SECTION 846 AND  
ENGAGING IN A CONTINUING CRIMINAL ENTERPRISE  
UNDER TITLE 21, U.S.C. SECTION 846 ARE  
SEPARATE AND DISTINCT OFFENSES.

The defendant Sperling alleges that he should not be resentenced under Count One of the indictment (Conspiracy) but instead that count should be dismissed because it is nothing more than a lesser included offense of Count Two, the continuing criminal enterprise charge. The argument lacks merit.

In United States v. Papa, Dkt. No. 75-1208 (2d Cir. April 2, 1976) Slip. Op. 2977, the defendant had pled guilty to a narcotics conspiracy charge in the Eastern



District of New York in 1972 and, as part of the plea, a pending Section 848 count was dismissed. Approximately two years later Papa was indicted and convicted in this district for a different narcotics conspiracy and one substantive count. In the Southern District trial court and on appeal Papa urged the same argument Sperling now raises, namely, that the Eastern District continuing criminal enterprise charge, §848, necessarily absorbed the conspiracy and substantive offenses charged in the Southern District indictment and thus prior jeopardy barred his prosecution. (See Appellants Brief at 528-45, United States v. Papa, Dkt. No. 75-1208\*. The Second Circuit rejected his claim stating, inter alia:

This Court has recognized that prosecution under Section 848 is distinct and separate from a prosecution for the conspiracy and substantive offenses that may constitute some of the evidence offered on an continuing criminal enterprise count.

United States v. Sperling, [506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975)] (Sperling convicted of separate

\* Thanks to the ease of communication provided to inmates of the Atlanta Penitentiary, Sperling has adopted Papa's argument - almost word for word. Compare the Brief in United States v. Papa, Dkt. No. 75-1208 at p 35-39 with Sperling's motion papers at 19-21.

substantive, conspiracy and section 848 offenses); United States v. Sisca, [503 F.2d 1337, 1345 (2d Cir.)], cert. denied, 419 U.S. 1008 (1974)] (appellant Abraham convicted of separate conspiracy and Section 848 offenses); United States v. Manfredi, [488 F.2d 588 (2d Cir. 1973)], cert. denied, 417 U.S. 936 (1974)] (Appellant La Cosa convicted of separate substantive conspiracy, and section 848 offenses). In sum, we reject [Papa's] claim that the dismissed section 848 count of the Eastern District indictment immunized him from the prosecution below United States v. Papa, supra Slip op, at 2992-2993.

See also United States v. Collier, 493 F.2d 327 (6th Cir. 1974), cert. denied, U.S. (1975).

Sperling ignores these decisions and instead relies, mistakenly, on a line of Supreme Court cases dealing with lesser included offenses in which the Court determined that Congress intended in each case to proscribe additional activities and not to alter the scheme of penalties. Thus, in Prince v. United States, 352 U.S. 322, the Court in interpreting the Federal Bank Robbery Act, 18 U.S.C. §2113, held that the crime of entry into a bank with intent to rob was not intended by Congress to be a separate offense from the consummated robbery since



"the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is completed Id at 328.

In Heflin v. United States, 358 U.S. 415 (1959) the Court found that subsection (c) of §2113, Title 18, United States Code, "was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber." Id at 419.

Finally, in Milanovich v. United States, 365 U.S. 551 (1960) it was held that Congress in passing 18 U.S.C. §561 did not intend that a defendant could be convicted and punished for stealing and also for receiving the same stolen property. However in Morgan v. Devine, 327 U.S. 638, the Court found that Congress intended to punish as separate and distinct crimes the offense of breaking into a post office with intent to commit larceny (now 18 U.S.C. 2115) and the actual larceny (now 18 U.S.C. §1708).

It is clear that in enacting 21 U.S.C. §848 Congress intended to create an offense separate and distinct from that of 21 U.S.C. §846 (conspiracy). As expressed in its legislative history, the object of section

848 is "to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic, while also providing a means for keeping those guilty of violations out of circulation "and constitutes" a new and distinct offense with all its elements triable in Court." 1970 U.S. Code Cong. and Admin. News 4576, 4651, (emphasis added) Congress' intention in this regard is made abundantly clear by the statutes themselves. At first glance they appear similar but upon analysis they are not. Section 848 is directed only at the kingpin of a particular narcotics operation since there is no provision in that section under which those with whom the organizer "acts in concert" can be punished. Thus under 848 the object is not to punish all those involved in concerted action or to make illegal the concerted action in itself, but rather to deter and provide appropriate punishment for defendants such as Sperling who direct such organizations. On the other hand the essence of the crime of conspiracy (§846) is agreement itself. Iannelli v. United States, 420 U.S. 770, 777 n.10 785 (1975). Therefore §848 is insufficient to combat the evil, i.e., the agreement, the conspiracy laws, in this



case §846, were designed to attack. United States v. Rabinowich, 238 U.S. 78, 88 (1915). Congress then, in enacting both Section 846 and 848 simultaneously obviously intended that each be a distinct crime. "If the legislation reveals anything, it reveals the determination of Congress to turn the screw of the criminal machinery - detection, prosecution and punishment - tighter and tighter." Gore v. United States, 357 U.S. 386, 391 (1958).

Sperling's reliance on Gore, supra and Blockburger v. United States, 284 U.S. 299 (1932) is misplaced. The Court in Blockburger, set forth a test whose function is to identify "congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction." Iannelli, supra at 785 n.17. That test, to the extent it is relevant here, requires the courts to examine each offense to determine whether each requires proof of a fact the other does not. Sperling claims that with regard to §846 and 848 this test is not met. However, it is obvious that it is. Conspiracy requires proof of an agreement while there is no such requirement in §846 but §848 on the other hand does require proof that

a charged defendant occupies a position as organizer, supervisor, or manager of five or more persons and that he obtain substantial resources from the continuing series of narcotics violations. None of these elements are required to prove a §846 narcotics conspiracy. Thus §846 and §848 clearly fit within the test laid down in Blockburger, supra. See also Iannelli v. United States, supra at 785 n.17.

It is clear then that §846 and 848 are separate and distinct offenses and a defendant may be convicted and sentenced for both.

SPERLINGS REMAINING CONTENTIONS ARE  
TOTALLY WITHOUT MERIT

The Charge to Jury on the Conspiracy Law

Sperling argues that the trial court charged the jury under the general conspiracy statute, 18 U.S.C. §371, rather than under 21 U.S.C. §846, the specific narcotics conspiracy statute, and therefore he should be subjected to only a 5 year sentence as provided by 18 U.S.C. §371. The argument is frivolous. The reference to §371 in the Court's charge was for definition purposes only and the court in setting forth the elements of the conspiracy



which the government must prove stated in part

Second, the government must prove that it was part of the conspiracy to unlawfully violate the narcotics statutes to which I have referred Tr. 4123.

Furthermore, even had the jury been charged under §371 rather than 846, there would be no error. United States v. Massiah, 307 F.2d 62, 68, 70 (2d Cir. 1962), rev'd on other grounds 377 U.S. 201 (1964)

The Withdrawal of the "Old Law"  
Objects From the Conspiracy

Count One of the indictment charged as one of the objects of the conspiracy the violation of sections 4705(a) and 7237(b) of Title 26, United States Code which were repealed on the enactment of the present narcotics laws on May 1, 1971. The "Old law" objects were withdrawn before the case was submitted to the jury. Sperling now claims that this action constituted an amendment of the indictment. The argument is specious. Salinger v. United States, 272 U.S. 542, 548 (1926); United States v. Colasurdo, 453 F.2d 585, 590 (2d Cir. 1971) cert. denied, 406 U.S. 917 (1972). Furthermore, if the indictment had been submitted

to the jury as drawn and a special verdict requested, Sperling, if the jury found that he had entered the conspiracy prior to May 1, 1971 would have faced a minimum of ten years imprisonment, and a maximum of forty years, 26 U.S.C. <sup>7237(b)</sup> rather than the 0-30 years limits provided by §846. Having received the benefits of the concession Sperling hardly has reason to complain. Sperling's claim that any protection against his indictment for a pre-May 1, 1971 "Old law" conspiracy was affected by the deletion is frivolous inasmuch as the 5 year statute of limitations on the "Old law" has run as of April 30, 1976, and thus makes his indictment for such a conspiracy impossible.

Finally, Sperling's assertion that he should be resentenced under 21 U.S.C. §844 since the jury could have found that the object of the conspiracy as to him was the simple possession of small amount of cocaine is ludicrous.

#### CONCLUSION

The motion of the defendant Sperling for dismissal of Count 1 of the indictment and for other relief



JPL:mcc

should be denied in all respects.

Respectfully submitted,

ROBERT B. FISKE, JR.  
United States Attorney for the  
Southern District of New York  
Attorney for the United States  
of America

JAMES P. LWIN  
Assistant United States Attorney  
Of Counsel.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:  
UNITED STATES OF AMERICA, :  
:  
vs. : 73 Cr. 441  
:  
HERBERT SPERLING, :  
Defendant. :  
:  
-----X

Before:

HON. MILTON POLLACK,  
District Judge.

New York, May 17, 1976;  
9.00 o'clock a.m.  
(Room 1306)

APPEARANCES:

ROBERT B. FISKE, JR., Esq.,  
United States Attorney for the  
Southern District of New York;  
BY: JAMES P. LAVIN, Esq.,  
Assistant United States Attorney.

HERBERT SPERLING, Pro Se.

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2 (Case called.)

3 MR. LAVIN: The Government is ready, your  
4 Honor.

5 THE DEFENDANT: The defense is ready, your  
6 Honor.

7 THE COURT: This matter is before the Court  
8 for resentence of the defendant Herbert Sperling on  
9 Count 1 set forth in the indictment herein, pursuant  
10 to the mandate of the Court of Appeals, Second Circuit,  
11 dated October 10, 1974, affirming the judgment of convic-  
12 tion entered by this Court dated September 12, 1973, which  
13 was affirmed at 506 F. 2d 1323, certiorari denied 420 U.S.  
14 962.

15 Mr. Sperling has filed a motion in which he  
16 is acting as his own attorney, and in connection therewith  
17 has filed an affidavit setting forth additional and  
18 specific grounds and prayers for relief in support of a  
19 motion for reconsideration of sentencing on Count 1.

20 Mr. Sperling, is there anything that you wish  
21 to say on your behalf before I resentence in this  
22 matter?

23 THE DEFENDANT: Yes, your Honor.

24 First, your Honor, I would like an opportunity  
25 to see my pre-sentence report, under the authority of

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2 Rule 32. I would like an opportunity to rebut any  
3 information that is not true, any false allegations or any  
4 unfounded claims. I would like a five or ten-minute  
5 recess to do that, your Honor.

6 THE COURT: All right. Here is a copy of  
7 the supplementary pre-sentence investigation report  
8 together with an accompanying letter from the Probation  
9 office in Atlanta, Georgia; a memorandum from the  
10 probation officer dated May 12, 1976, as well as a copy  
11 of the pre-sentence report of 1973. Please look them  
12 over.

13 THE DEFENDANT: Thank you, your Honor.

14 (Pause.)

15 THE COURT: Having looked at these and having  
16 considered these reports and having considered your  
17 motion, is there anything that you want to say, Mr.  
18 Sperling, on your own behalf, before resentence?

19 THE DEFENDANT: Yes, your Honor. I would  
20 like to take objection to the pre-sentence report  
21 page 32 saying that I am an enforcer and right-hand man  
22 of Vincent Gigante, who is an associate of Vito Genovese.  
23 It's a bold-faced lie and just thrown there to prejudice  
24 you in my sentencing. That is the only objection I  
25 have to the pre-sentence report, your Honor.



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2 THE COURT: I will take no notice of that  
3 suggestion, and frankly, I don't believe I ever noticed  
4 it before. I don't even find it on page 3. Is it  
5 page 3 of the supplement? Is that what you are talking  
6 about?

7 THE DEFENDANT: Page 3 of the original, towards  
8 the bottom of the page.

9 THE COURT: Take this down to the defendant  
10 have him point it out.

11 (Pause.)

12 THE DEFENDANT: The part that is underlined,  
13 your Honor.

14 THE COURT: I see what you are referring to.  
15 That apparently is a reference to alleged institutional  
16 records and it will have no bearing at all on the subject  
17 of this morning.

18 THE DEFENDANT: Thank you, your Honor.

19 The second point I have is that I would like  
20 to renew all objections to me being sentenced as a  
21 second offender. I deny that I am a second offender.  
22 I argue that the second offender information that was  
23 submitted to the Court after my trial and not prior to  
24 my trial, the Government at the time of my original  
25 sentencing stated that it was given to the Court and to

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2       the defense on the 14th of June; the stamp from the  
3       docket entry shows that it was submitted on the 15th when  
4       my trial started, because the contravention by the law of  
5       the Court, submitted prior to trial, any second offender  
6       information.

7               I also submit that my original conviction is  
8       not a valid conviction, it was in violation of Rule 11,  
9       due process, and I received an illegal sentence and I am  
10      a first offender for the purpose of sentencing, your  
11      Honor.

12             I also renew all prior motions made at  
13      sentencing that I didn't cover in what I just said.

14             THE COURT: Anything else?

15             THE DEFENDANT: Yes. I received yesterday  
16      just as I was leaving from Atlanta, I received Mr. Lavin's  
17      memorandum of law in response to the 50-page memorandum  
18      that I submitted. I realize that was inadvertent on the  
19      part of the Government and since I cannot draw up a  
20      response I thought I would give an oral answer now so I  
21      can make my record.

22             First, I'd like to make it clear for the  
23      record that --

24             THE COURT: I would just like to let you know  
25      that I just got mine this morning.

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2 THE DEFENDANT: You are smarter than me so  
3 you will be able to follow it better than me. The  
4 Government for some reason which is unbeknownst to me  
5 has construed my motion as a 2255 submitted under Title  
6 28. That is totally erroneous.

7 THE COURT: I agree with you.

8 THE DEFENDANT: Thank you, your Honor.  
9 I won't have to go into that.

10 My issue that I submitted in my brief is simple  
11 and concise and has never been raised before in any court  
12 of law to my knowledge. If the Government can show  
13 me a case, I will concede I am in error. My contention  
14 is that Title 21, Section 848 clearly and unambiguously  
15 states that 846, the narcotic conspiracy is a necessarily  
16 required element in its language. There is no need  
17 to go into any discussion about what Congress meant  
18 because obviously what they meant they said.

19 I am going to read you the portion that is  
20 applicable, your Honor. I hope you will bear with me,  
21 I'm a little slow here.

22 Continuing criminal enterprise, in part.  
23 Any person -- here -- defined, for purposes of Sub-  
24 section A of this section, a person is engaged in a  
25 continuing criminal enterprise if he violates any

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2       provision of this subchapter or Subchapter 2 of this  
3       chapter, the punishment for which is a felony.

4               846 is in that subchapter.       The Government  
5       argues that this was decided in Papa, but they say I didn't  
6       raise it.   They can't have it both ways.   If I didn't  
7       raise it, then my case being decided in Papa obviously  
8       isn't applicable to that point.

9               The Papa case is decidedly different from my  
10       case.   I have his decision here --

11              THE COURT:   It looks like somebody combined  
12       either you with him or he with you because the words in  
13       the two motions seem to be identical.

14              THE DEFENDANT:   You know what I think, your  
15       Honor, and I don't mean to be braggadocio, the lawyers are  
16       stealing my material.

17              THE COURT:   Somebody plagiarized somebody  
18       else's material.

19              THE DEFENDANT:   I hope I can sue at some future  
20       date.

21              In the Papa decision on 2992, this is the  
22       slip opinion decision, the Court of Appeals says, appellant  
23       argument apparently rests upon speculation as to the  
24       evidence that would have been introduced.   In my case  
25       there is no speculation.   Everyone here is aware that the

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evidence introduced on Count 1 was the same as Count 2.

Your charge to the jury, namely the same 8  
on both counts fully cemented it. It fits right in  
with Blockburger.

The Government says that the elements are  
different, and they are right. There are more elements  
in 848. The element of 846 is an agreement, which is  
the necessary requirement of a conspiracy. It is the  
essence of a conspiracy, an agreement. Concerted  
action is another legal definition for conspiracy.  
It is impossible to act in concert with anyone without  
agreeing to do so first. It's the same thing and it  
is a play on words.

THE COURT: It takes two to conspire, at least  
two.

THE DEFENDANT: At least two, you're correct,  
your Honor. And it takes at least five acting in concert  
with an individual charged in 848. Therefore, the  
requirement of proof is greater in 848. That is why  
Count 1 fits right into Count 2.

The only thing I can point out is now on the  
five-year issue, on the charge of 371, the Government's  
concession was clearly spurious for the simple reason that  
it was given after the lawyers had summed up, made their

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summation. They had no knowledge, and obviously the Court had no knowledge of what was going on. The only thing that saved Count 1 for the Government from being incurably duplicitous is your Honor's intellectual acumen. You saved the case for the Government, and I think that your intellectual honesty now should direct you to sentence me according to the charge that you gave.

No evidence was ever effectively withdrawn from the jury as to the pre-May 1st conspiracy. I have here my own opinion. It was relied on, this evidence was relied on in the Government's summation, in the Judge's charge, and in the Government's argument to the Court of Appeals.

It's obvious they can't have it both ways. They can't say it was withdrawn and then rely on it to affirm a conviction. The only statute that was applicable for both time periods was Title 18-371, and your Honor wisely chose to save the count for them by charging to the jury.

Since I am found guilty of Title 18-371, I think it's only fair that I be sentenced accordingly. In the slip opinion page 5645, this is what the Court of Appeals says about Mr. Barry Lipsky:



"His testimony was critical because beginning in April, 1971 and continuing to February, 1972" -- they relied on pre-May 1st evidence to affirm my conviction.

I have researched cases till they are coming out of my ears, to be frank with you, and if the Government can produce one case where the evidence has not been effectively withdrawn from the jury I will concede the issue, and I am putting that on the record. There is no case unless the evidence -- there is no evidence submitted, no evidence received or the evidence was not properly withdrawn. The count was no good, or I had to be sentenced under the statute that was charged.

I have the Massiah case here, if it will help the Court, in slip decision. The amendment to the indictment, the only thing that saved Count 1 was the amendment that your Honor made, making it a 371 crime.

If it doesn't say a 371 crime, the amendment was no good because the Government's concession was totally spurious. It was timed perfectly to put the defense in a very good position and in a trap, so to speak, and it was only your wisdom that allowed that count to even go to the jury, let alone for the Government to gain a conviction on it, and I don't see how fairly and honestly they can expect or want me to receive a 30-year sentence

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2 when the jury found me guilty of a five-year count.

3 That's about all I can think of, your Honor.

4 THE COURT: Is that your entire argument?

5 THE DEFENDANT: As best I can put it in my  
6 humble way.

7 THE COURT: I will hear the Government.

8 MR. LAVIN: As far as the second offender  
9 information goes, your Honor, that was filed, if you recall,  
10 at the time of Mr. Sperling's last sentencing and your  
11 Honor found he was the person named. I suggest that this  
12 applies to this hearing as well, this resentence.

13 I have nothing further to say. Your Honor is  
14 aware of the evidence against Mr. Sperling at the time of  
15 trial, aside from those three counts which played only a  
16 minor part in the whole trial. There was overwhelming  
17 evidence of the conspiracy and the huge quantities of  
18 heroin that he and his organization were responsible for  
19 distributing.

20 I think at the time of his arrest he had  
21 approximately 30 kilos of heroin on the streets of New York  
22 City, which had been mixed within the last two weeks by  
23 Joseph Conforti.

24 THE COURT: This case is before the Court to  
25 consider whether there would have been any mitigation of



the sentence imposed on Count 1 if it had stood alone and not been accompanied by Counts 8, 9 and 10.

The sentence as originally imposed on September 12, 1973 on Counts 1, 8, 9 and 10 was a term of 30 years on each of those counts to run concurrently with each other. And then provision was made for fines on each of the counts. The fines, however, were not overlapping but were individual fines on Counts 1, 8, 9 and 10 for a total of \$200,000.

I have given consideration to the points that have been made on this application for resentence; the pre-sentence report as originally filed was updated by further investigation, and I have made a careful examination of the legal points that have been skillfully set forth in the motion papers.

Basically, Mr. Sperling charges that there was a defect in the indictment, that there was duplicity of charges in the indictment, that there was duplicity in the Court's instructions to the jury, and that he is entitled to have the limitation set forth in one of the subdivisions of the relevant statute applied in fixing the term on resentence. The issues as posed are really not novel, but they are cast in a novel context.

Preliminarily, it should be noted that the

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2 defendant failed to present his present arguments to the  
3 Court of Appeals, and the time has thus long since been  
4 passed within which he would have been entitled to a  
5 judicial consideration of the merits. However, in recog-  
6 nition of the serious penalty which has been meted out,  
7 I have nonetheless addressed the challenges that Mr.  
8 Sperling has presented to this resentencing proceeding  
9 without, of course, impairing in any way the fact that  
10 these matters are no longer open.

11 But, assuming that they were, Mr. Sperling  
12 contends that the conspiracy of which he was convicted in  
13 Count 1 was a lesser included offense within the continuing  
14 enterprise of which he was convicted in Count 2 and,  
15 therefore, that he may not be given a separate sentence  
16 on Count 1.

17 The fact that both the conspiracy count and  
18 the continuing enterprise count as sent to the jury  
19 allegedly encompassed the same time period while the counts  
20 in the indictment as originally charged present different  
21 dates does not affect the result which this Court reached  
22 on the similar argument and motion that was made in advance  
23 of trial, and ruled upon on May 30, 1973.

24 As indicated previously, there was no appeal  
25 from that ruling. Moreover, while the counts in the

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indictment as originally charged presented different dates, that does not affect the result reached on the pretrial motion.

The critical distinction is in the number and identity of the participants, not in the time frame of the two counts. Curiously, in papers that resemble Chinese copies of present papers, the Second Circuit has recently declared in explicit terms in United States against Papa, decided on April 2nd, 1976, that prosecution under Section 848 is distinct and separate from prosecution for conspiracy and substantive offenses that might constitute some evidence offered on a continuing criminal enterprise count. It would thus seem that the Court of Appeals has expressly rejected the very argument which Mr. Sperling presents here.

There have been numerous cases in the Second Circuit and in other Circuits where convictions of the same defendant were affirmed upon both Sections 846 and 848 which seem, therefore, that a separate sentence under Count 1 is properly in this case.

The next point that the elimination of the portion of Count 1 relating to the old law conspiracy was an impermissible amendment of the indictment has recently been treated in a case in the Second Circuit which clearly

held that an indictment is not affected or destroyed by reduction of the matters charged, but only by addition to the matters charged. The record shows that the defendant was convicted of a conspiracy to violate the narcotic laws and such a conspiracy is properly punishable pursuant to Section 846.

Incidentally, it may be noted that Mr. LaPorte specifically raised the question at the time of the sentencing in 1973 to satisfy himself that the sentencing was pursuant to Section 846 when the sentence was imposed on Count 1. That appears in the transcript of September 12, 1973.

The final contention that Mr. Sperling makes is that the term to which sentence may be addressed must be limited to a maximum of two years imprisonment. That argument fails because of the very terms of 21 USC, Section 846. In this case the indictment concerned a conspiracy under Section 846 to violate Section 841. There is no reference in the indictment nor in any of the proceeds at the trial to Section 844, which is the simple possession provision, as to which confinement is limited to two years, and no mention of that statute was ever made to the jury. It goes without saying that there need not be proof in connection with a conspiracy count of the



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2 actual commission of the substantive offense to sustain  
3 a conviction for conspiracy to commit it. Conspiracy as  
4 correctly noted by Mr. Sperling involves at least two or  
5 more persons, and involves planning and does not require  
6 for its validity proof of the carrying out of the term.

7 Accordingly, upon this application for re-  
8 consideration of the sentence it is clear that by not making  
9 the sentences under Counts 1, 8, 9 and 10 cumulative, the  
10 Court did not thereby indicate and does not now indicate  
11 that separately those counts would not have carried the  
12 same term as was originally imposed. Reconsideration  
13 of the sentence heretofore imposed on Count 1, the same  
14 be and hereby is adhered to, namely, the defendant Herbert  
15 Sperling is sentenced on Count 1 to the custody of the  
16 Attorney General or his authorized representative for a  
17 term of 30 years, and fined the sum of \$50,000, together  
18 with the costs of prosecution as provided in the said  
19 judgment of September 12, 1973, this sentence to run con-  
20 currently with a sentence imposed on Count 2 on September  
21 12, 1973 by this Court.

22 The defendant is to stand committed until the  
23 fine is paid or until he is otherwise discharged according  
24 to law.

25 THE DEFENDANT: Thank you, your Honor. I would

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like to put on the record that I want to file a notice of appeal and I am going to give the papers to my family to file with the proper clerks in the building with whatever filing fee is necessary.

THE COURT: I didn't get the last part. You want to file a notice of appeal? Give that to the clerk.

THE DEFENDANT: I have to give a filing fee. I don't have the money with me.

THE COURT: That's all right.

THE DEFENDANT: How many copies do I have to file?

THE COURT: I think it is just the original that is file and you serve a copy on the Government. So you give Mr. Lavin a copy now. He will give you a copy received endorsed on the back of it so that when it is filed it will be filed with notation of the receipt of a copy by the Government. A memorandum opinion will be filed during the course of the day in explication of the matters discussed.

THE DEFENDANT: Thank you very much, your Honor.

THE COURT: And an order will be entered accordingly.



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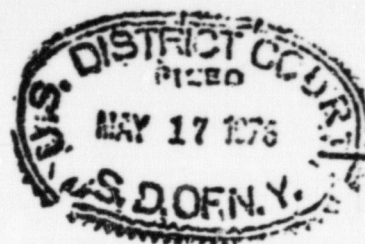
THE DEFENDANT: Thank you, your Honor.

THE COURT: The pro se clerk will be instructed  
to see to it that a copy of that opinion is mailed to  
Mr. Sperling.

THE DEFENDANT: Thank you, your Honor.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----X  
UNITED STATES OF AMERICA :

v. :

HERBERT SPERLING, :

Defendant. :  
-----X

73 CR. 441 (MP)

ORDER AND JUDGMENT  
ON  
RESENTENCE

This cause having come before the Court for resentence of the defendant, Herbert Sperling, on Count I set forth in the indictment herein, in pursuance of the mandate of the Court of Appeals, Second Circuit, dated October 10, 1974 affirming the judgment of conviction entered by this Court dated September 12, 1973, which was affirmed at 506 F.2d 1323, certiorari denied 420 U.S. 962 (1975); and after hearing the defendant and due deliberation having been had, it is

ORDERED and Adjudged upon reconsideration of the sentence heretofore imposed on Count I, the same be and hereby is adhered to, viz.: the defendant, Herbert Sperling, is sentenced on Count I to the custody of the Attorney General or his authorized representative for a term of thirty (30) years and fined the sum of \$50,000, together with the costs of prosecution as provided in the said judgment of September 12, 1973, this sentence to run concurrently with sentence imposed on Count II on September 12, 1973 by this Court, the said defendant to stand committed until the fine is paid or he is otherwise discharged according to law. It is further

ORDERED that the Clerk deliver three certified copies of this judgment and order to the probation officer of this Court, one of which shall be delivered to the defendant by the probation officer.

SO ORDERED.

May 17, 1976

*Milton Pollack*  
Milton Pollack

U.S. District Judge

A True Copy, Certified this 17th day of May, 1976

(Signed) Raymond F. Burghardt  
Clerk

(By) Ralph A. Corning  
Deputy Clerk



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

MAY 17 1976

-----X  
UNITED STATES OF AMERICA,

v.

HERBERT SPERLING (PRO SE),

Defendant.

73 CR. 441(MP)

MEMORANDUM

-----X  
APPEARANCES:

ROBERT B. FISKE, JR.  
United States Attorney for the  
Southern District of New York  
By: James P. Lavin,  
Assistant United States Attorney

HERBERT SPERLING, PRO SE

MILTON POLLACK, District Judge.

MICROFILM

MAY 17 1976

MILTON POLLACK, District Judge.

The Court of Appeals for the Second Circuit affirmed the convictions of the defendant Herbert Sperling under 21 U.S.C. § 846 for conspiracy to violate the narcotics laws as charged in Count I of the Indictment and under 21 U.S.C. § 848 for engaging in a continuing criminal enterprise as charged in Count II of the Indictment. United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

The appellate court reversed Sperling's convictions on the substantive offenses of distributing and possessing with intent to distribute narcotic controlled substances in violation of 21 U.S.C. § 841, as charged in Counts VIII, IX, and X. Although sustaining the conspiracy conviction, the Court of Appeals remanded for reconsideration of sentencing on that Count in view of the concurrent sentences which this Court had imposed on the conspiracy count and the substantive counts. Counts VIII, IX and X of the Indictment were nolle prosequied after



the Supreme Court denied a writ of certiorari on Sperling's application therefor on Counts I and II.

The defendant now moves to avoid resentence, or at least to mitigate his punishment on the conviction of the crime of conspiracy. The arguments presented in his motion papers are ingenious, but, as this analysis will illustrate, unpersuasive. It should be noted that the defendant failed to present these arguments to the Court of Appeals, and the time has thus long since passed at which he would have been entitled to judicial consideration of their merits.

In recognition of the serious penalty which has been meted out for the defendant's deadly serious crimes, this Court will nonetheless address the challenges he has presented to this resentencing proceeding.

I.

The defendant contends that the conspiracy of which he was convicted in Count I was a lesser-included offense within the continuing criminal enterprise of which he was convicted in Count II, and therefore that he may not be given a separate sentence on Count I. See United States

v. Umans, 368 F.2d 725 (2d Cir. 1966), cert. dismissed, 389 U.S. 80 (1967).

This legal proposition is faulty so far as concerns this case for a number of reasons. As this Court held in its decision denying a pre-trial motion which raised the same argument, a conspiracy is entirely independent of a related substantive offense which itself involves concerted action so long as the conspiracy charged involves a larger number of participants than the substantive offense requires. See, e.g., United States v. Bommarito, 524 F.2d 140, 144 (2d Cir. 1975); United States v. Becker, 461 F.2d 230 (2d Cir. 1972), vacated on other grounds, 417 U.S. 903 (1974). The fact that both the conspiracy count and the continuing enterprise count, as sent to the jury, allegedly encompassed the same time period, while the counts in the Indictment as originally charged presented differing dates, does not affect the result reached on the pre-trial motion; the critical distinction is in the number and identity of the participants, not in the time frame of the two counts.



Furthermore, the Second Circuit has recently declared in explicit terms that

prosecution under section 848 is distinct and separate from a prosecution for the conspiracy and substantive offenses that may constitute some of the evidence offered on a continuing criminal enterprise count. United States v. Papa, No. 75-1208 (2d Cir., April 2, 1976) at 2992.

Thus, the Court of Appeals has expressly rejected the very argument which the defendant presses here. It is clearly within the power of the Congress to prescribe multiple penalties for statutes which may overlap and proscribe similar conduct; that is what Congress has seen fit to do in regard to violations of §§ 846 and 848, so that a challenge based on improper multiplicity must fail. See United States v. Bommarito, supra, 524 F.2d at 144 & n.4; cf. 1 C. Wright, Federal Practice & Procedure § 142 (1969) at 312.

Indeed, the Second Circuit has not hesitated to affirm convictions of the same defendant under both §§ 846 and 848. See, e.g., United States v. Sisca, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974); United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973), cert. denied,

417 U.S. 936 (1974). Accordingly, a separate sentence under Count I is proper in this case.

II.

Sperling's next point is that Count I of the Indictment was duplicitous since that single count charged both a conspiracy under the so-called "old law" narcotics statute, 26 U.S.C. § 7237(b), and a conspiracy under the "new" law, 21 U.S.C. § 846. Since only the conspiracy charged under the new law was submitted to the jury, however, Sperling is compelled to argue that the deletion of the portion of the count relating to the old law conspiracy represented an impermissible amendment of the Indictment.

Both of Sperling's premises are faulty. First, the Indictment was not duplicitous as originally drafted, for it charged a single agreement to violate the narcotics statutes; while the laws in effect were changed during the course of the conspiracy, thus necessitating the reference to two sets of statutory provisions, the agreement itself did not. Thus, the Indictment properly charged only a single agreement, albeit one which embraced the



commission of different substantive offenses. See United States v. Quicksey, 525 F.2d 337 (4th Cir. 1975); United States v. Amato, 367 F. Supp. 547 (S.D.N.Y. 1973).

Secondly, the deletion of the old law portion of the count, which cured any conceivable duplicity, was not an impermissible amendment of the Indictment. As the Second Circuit recently held in United States v. Sir Kue Chin, No. 75-1227 (2d Cir., April 21, 1976), the deletion of a separable portion of an Indictment is perfectly proper; it is only the addition of a new or different charge as a supplement to the grand jury's Indictment which is impermissible. This is the case even where proof has been adduced on the deleted portion of the Indictment, as the defendant alleges occurred at his trial. See United States v. Sir Kue Chin, supra. Hence there is no merit to the defendant's attack on the Indictment.

The defendant also argues that the Court's jury instructions on Count I, which included a reference to the general conspiracy statute, 18 U.S.C. § 371, in addition to the specific narcotics conspiracy statute charged in the Indictment, was duplicitous. That contention must

fail for the same reason that the similar argument addressed to the Indictment's reference to two conspiracy statutes failed.

The defendant further contends, however, that since more than one conspiracy statute was charged in a single count, he may be sentenced only pursuant to the statute which prescribes the lesser penalty. In this case the less punitive statute is § 371, which entails a maximum sentence of five years' imprisonment.

The theory behind this argument, which has seeming support in case law, is that there is no way to determine which of the two conspiracy statutes the jury acted under in deciding to convict the defendant of the count charged. See United States v. Quicksey, supra; United States v. Amato, supra. That is not the fact here, however, for such reasoning applies only where the two conspiracies charged involve different substantive offenses as their objectives, so that the elements of proof of the two conspiracies are not the same.

The jury instructions challenged here clearly charged a single conspiracy, since the jury was specifical-



ly told that an essential element of the offense was a finding that the goal of the conspiracy was to violate the Controlled Substances Act. Thus, the elements of the § 371 conspiracy charged were identical to that of the § 846 conspiracy, with the sole exception that the § 371 conspiracy required proof of the commission of an overt act, while the § 846 conspiracy did not. See United States v. Bermudez, 527 F.2d 89 (2d Cir. 1975). That difference merely increased the burden on the government, and thus was in no way prejudicial to the defendant. Consequently, there was no possible ambiguity in the jury's verdict. The defendant was convicted of a conspiracy to violate the narcotics laws, and such a conspiracy is properly punishable pursuant to § 846.

It should also be noted that the defendant's attorney, Mr. Raymond E. LaPorte, specifically assented to the sentencing of the defendant pursuant to § 846 when sentence was imposed on Count I. (Transcript, September 12, 1973 at 53-54).

### III.

The defendant's final contention is that any

resentence on Count I pursuant to § 846 must be limited to a maximum of two years' imprisonment. The defendant argues that the only substantive offense which the jury could have found he committed from the evidence adduced at trial was the simple possession of narcotics in violation of 21 U.S.C. § 844, an offense which prescribes a two-year maximum penalty.

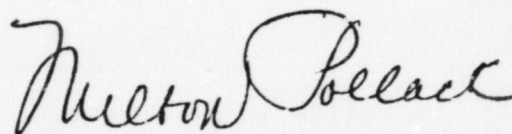
This argument is patently specious. Punishment under § 846 is bounded by the "maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846. In this case the Indictment charged a conspiracy under § 846 to violate § 841, the distribution and possession with intent to distribute narcotics. There is no reference to § 844, the simple possession provision, in the Indictment, and no mention of that statute was ever made to the jury. Of course, there need be no proof that a conspirator actually committed the substantive offense to sustain a conviction for conspiracy to commit it. Hence, the defendant Sperling is subject to the punishment prescribed for violations of § 841 as a consequence of



his conviction under § 846 to violate § 841.

Accordingly, the defendant's motion is in all respects denied, and the sentence previously imposed is hereby adhered to as set forth in the order and judgment made in connection with this proceeding.

SO ORDERED.



Milton Pollack

U.S. District Judge

May 17, 1976

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-AGAINST-

HERBERT SPERLING, ET AL,  
DEFENDANTS

73 CR. 441 (SUPERSEDING INDICTMENT)

NOTICE OF APPEAL

The undersigned defendant, Herbert Sperling, acting as his own attorney, hereby appeals to the United States Court of Appeals for the Second Circuit, from this Court's Order dated May 12 1976, insofar as said Order, on reconsideration of sentencing pursuant to mandate of the Court of Appeals, failed to grant the following relief sought by this defendant in his notice of motion and supporting affidavit dated March 18, 1976, as amended:

(1) Insofar as this Court in said order failed to hold that the Count One conspiracy was a necessarily required element and lesser included offense of the concerted action and series of violations charged in Count Two as elements of a continuing criminal enterprise; and insofar as this Court denied defendant's motion to vacate the sentence imposed on Count One, and vacate the conviction on Count One, and dismiss Count One, with prejudice;

(2) Insofar as this Court in said order failed to construe Count One as drawn under the general conspiracy statute (18 U.S.C. 371), and denied defendant's alternative prayer for relief, to-wit, to re-sentence defendant under penalty provision of 18 U.S.C. 371, to a prison term of not more than five years and a fine of not more than \$10,000;

(3) Insofar as this Court in said order failed to hold, that unless Count One is construed as drawn under 18 U.S.C. 371, it is incurably duplicitous, and fatally defective, and any sentence imposed on Count One would be totally void;



(4) Insofar as this Court in said order failed to hold that if the allegations and proof of the pre-May 1, 1971 conspiracy were effectively withdrawn from the jury, then Count One was impermissibly amended in violation of the Fifth Amendment, and any sentence imposed on Count One in such event was totally void;

(4) Insofar as this Court in said order failed to hold that if Sperling is re-sentenced as a second offender under 21 U.S.C. 846, then the maximum legal penalty is two years and \$10,000 fine, as the jury could have found that the object of the conspiracy charged in Count One, as to Sperling, was simple possession of cocaine, for which the maximum penalty as a second offender is two years and \$10,000 fine.

This 17 day of May, 1976.

HERBERT SPERLING  
DEFENDANT-MOVANT-APPELLANT PRO SE  
BOX PMB 78271

CERTIFICATE OF SERVICE

I certify this 17 day of May, 1976, that I have mailed a copy of the foregoing notice of appeal to counsel for the Government, first class postage prepaid, addressed as follows: United States Attorney, 1 St. Andrews Plaza, New York, N.Y. 10007.

I certify this 17 day of May, 1976, that I have served a copy of the foregoing notice of appeal on counsel for the Government by handing a copy of same to Assistant United States Attorney \_\_\_\_\_

*Herbert Sperling*  
HERBERT SPERLING  
DEFENDANT-MOVANT-APPELLANT, PRO SE  
BOX PMB 78271